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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

I. F. SEARLE, MINNIE A. GIBBS and MERRILL, COX & COMPANY, Creditors of the Estate of Stack-Gibbs Lumber Company, Bankrupt,
Appellants,

vs.

MECHANICS LOAN & TRUST COMPANY and THE EXCHANGE NATIONAL BANK OF SPOKANE, Creditors of Stack-Gibbs Lumber Company, Bankrupt,
Appellees.

No........

IN THE MATTER OF STACK-GIBBS LUMBER COMPANY, BANKRUPT.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION.

APPELLEES' BRIEF

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STATEMENT OF CASE.

The order of the Referee complained of is in the record at pages 64-69. The decision of Judge Dietrich and his order affirming the Referee's order will be found on pages 78 to 87 of the record.

Several of the creditors mentioned in the order have not appealed to this court. Those not appealing are Fort Dearborn National Bank, S. H. Hess, Mrs. Tolerton, Idaho Timber Company, Shoshone Lumber Company and J. K. Stack. The amount of their claims as shown after their signatures to the trust deed (Record 57-58) is $350,000. The amount of the claims of the appellants is $288,000. Mr. Stack did not file any objections before the Referee; the others did.

On February 1, 1916, the trust deed was signed at Minneapolis. It was prepared by H. J. Aaron, a Chicago attorney. (Rec. 216.) He also signed the trust deed on behalf of the creditors, Merrill, Cox & Company and Fort Dearborn National Bank. The instrument was prepared and signed at a meeting of these creditors, being the principal creditors of the bankrupt, in the city of Minneapolis, except that it was not signed there by Mr. Stack, Mrs. Tolerton or Mrs. Gibbs. (Rec. 217.) At the same time in Minneapolis there was signed by these creditors a letter of instruction to the Mechanics Loan & Trust Company, which is as follows:

> "We, the undersigned creditors of Stack-Gibbs Lumber Company, have executed as creditors the deed of trust to you given by said company, and request that while you take possession at once of the property described therein and perform all your duties under said trust deed, *you shall not at this time place said deed of record* until you shall believe under the advice of counsel that it is necessary so to

do in order to protect our rights in the premises, especially as against other creditors. We understand, of course, that if this deed of trust is not put of record it will be possible for the Lumber Company to make some conveyances of property, but we have not the slightest fear of anything of that kind being done, and feel that it is for the best interests of the creditors, as well as the Lumber Company, *that as little notoriety as possible be given to this trust,* and for that reason suggest you do not place said instrument of record until you feel the same is imperative." (Rec. 219.) (Italics ours.)

On February 2nd this letter and trust deed were mailed to Mr. Stack. He signed same and thereafter forwarded same to Mr. H. J. Aaron at Chicago to obtain the signature of Mrs. Tolerton, who there resided.

In Mr. Coman's letter to Mr. Stack, referring to the trust deed, it is said:

> "This arrangement has been the result of a conference of the different creditors of Mr. Gibbs' concerns representing more than ninety per cent. of the indebtedness. It seems to all concerned to be the best plan to conserve the assets of the concerns and at the same time protect the interests of the creditors.' (Rec. 218.)

Mr. Gibbs submitted to the creditors at Minneapolis a statement of his assets and liabilities, and these creditors figured that when the trust deed was signed by Mrs. Tolerton it would have been signed by creditors representing 90% of the debts of the company. (Rec. 220.) They were all

anxious that the trust deed be executed as soon as possible, and because of delay, Mr. Aaron, on February 5, 1916, telegraphed Mr. Coman as follows:

> "Contracts not yet returned by Stack. Can you hurry him."

And again telegraphed on February 7th:

> "Contract received. Now awaiting Mrs. Tolerton's signature. Will wire when secured."

And again on February 9th:

> "Contract signed by Mrs. Tolerton yesterday. Mailing this morning." (Rec. 222.)

On February 9th Mr. Coman wrote Mr. Stack:

> "I received a wire from Chicago that Mrs. Tolerton has signed and that finishes the execution of the agreement."

On the same day Mr. Coman wrote Mr. Aaron:

> "I am in receipt of a telegram under date of the 9th, advising that Mrs. Tolerton has signed the contracts. The trustee will go ahead and make the advances to take care of the payrolls due, in anticipation of the arrival of the contracts."

Mr. Gibbs, the president of the bankrupt, agreed that that might be done. (Rec. 224.)

Mr. Aaron answered that letter but made no objection to said advances being made. The trust deed provides in paragraph 21 thereof (Rec. 47-48):

> "It is further agreed that this instrument shall not take effect until * * * * the resignations of one of the directors of each of said companies, and that Sigmund Katz of Chicago,

> Illinois, shall be elected by said stockholders of said Lumber Company and said Mill Company a director and secretary and treasurer of each of said companies, and provided, further, that said Katz or any other person that the majority in amount of the creditors of the Lumber Company who shall sign the within instrument shall name, shall be elected and retained as such director and officer of such Lumber Company and such Mill Company until the trust created by the within instrument shall be terminated."

Mr. Aaron suggested Mr. Katz as the man to come out to Idaho and run the business. He said that by reason of their large interests here they were entitled to have their man on the job, and he knew him and that he was a capable man and familiar with the lumber business. (Rec. 225.)

On February 9th Mr. Aaron wrote Mr. Coman, enclosing the five copies of the trust deed and also copies of the letter which states to keep the trust deed off the record and keep the matter secret, and advised Mr. Coman to see that there was held a stockholders' meeting of each company and that Mr. Katz was elected director and secretary and treasurer of each company, and that Mr. Katz "is leaving Sunday for Spokane and will report the moment he arrives in your city." (Rec. 225-226.)

On February 15th Mr. Aaron wrote Mr. Coman acknowledging receipt of Mr. Coman's letter of the 9th inst. and stating that Mr. Katz had left Sunday night. When Mr. Katz arrived he presented a

letter of introduction from John Fletcher, the vice-president of the Fort Dearborn National Bank, stating:

> "This letter will introduce the bearer, Mr. S. Katz, who will call upon you within a few days to take up his duties in connection with the Stack-Gibbs Lumber Company. We have asked Mr. Katz to report direct to you, with the understanding that he will be made an officer and director of the two companies as arranged in the agreement." (Rec. 226-227.)

On February 15th a stockholders' meeting of the bankrupt was held and Mr. Katz was elected director, and on the same day, at a meeting of the board, he was elected secretary and treasurer. (Rec. 144.)

On February 18th the trust deed was authorized and ratified at a stockholders' meeting of the bankrupt. (Rec. 145.) On the same day it was approved at a directors' meeting of the bankrupt. (Rec. 146.) It was likewise approved at a directors' meeting and stockholders' meeting of the Dryad Company. (Rec. 147-148.)

As soon as the telegram from Aaron that Mrs. Tolerton had signed was received, the trustee commenced advancing money, which was in pursuance of the agreement between the creditors at Minneapolis. (Rec. 228.) Mr. Katz was told as soon as he arrived in Spokane that he would represent the trustee in the management of the business under

the trust deed. (Rec. 228.) Mr. Katz was an adverse witness, friendly to his Chicago friends who were objectors in this proceeding, and dodged as to the point that he was the representative of the trust company, but finally made this statement:

"Q. Did you have any talk with Mr. Coman about your being the man on the ground who would be the representative of the Mechanics Loan & Trust Company in doing those things, whatever was to be done?

A. I suppose it was taken for granted, but he didn't point it out specifically." (Rec. 166-167.)

Mr. Coman testified:

> "Mr. Katz and I had quite a conversation about the matter of his being in charge and which way he should handle the business under the trust agreement. I explained our views of the situation and told him it was necessary to handle it diplomatically, etc." Rec. 228.)

In March, 1916, the manager of the trust company wrote a letter to Mr. Katz, enclosing a copy of a letter received by the trust company from its attorney, F. T. Post, outlining the duties and responsibilities under said trust deed and asking Mr. Katz to prepare a general inventory as of the date "we assumed control under the trust deed" and also a statement of cash receipts "since we have been in charge," and advising that a letter be received from the Stack-Gibbs Lumber Company stating that it recognized Mr. Katz as the agent of the trust company. (Rec. 169-170.) Such letters

were promptly obtained by Mr. Katz and forwarded to the trust company. (Rec. 170-171.)

Mr. Post testified that he prepared the minutes and was present at the meeting of the stockholders and directors of these companies on February 18th, and at that time or before that meeting he had a conversation with Mr. Katz about the fact that Mr. Katz was representing the trust company, and the responsibility was upon him of running the business. (Rec. 258-259.)

The business was carried on in accordance with the provisions of the trust agreement until July 29, 1916, when the appellant Merrill Cox & Co and Fort Dearborn National Bank, through their attorney, Elmer H. Adams, and one other creditor, filed a petition in bankruptcy, commencing this proceeding. The trust deed was kept off the records in accordance with the letter of instructions from the creditors until that time when it was filed for record. Advancements amounting to $100,000 were made from time to time by the trust company in accordance with the trust deed. Mr. Katz wrote various letters to the trust company enclosing notes for these advancements. All the notes, with the exception of two for the total sum of $10,000, were made payable to the trust company. With each note was a letter substantially in the form of Exhibit 27 (Rec. 185) as follows:

> "Herewith our ninety-day notes Nos. 7414 and 7415 for $5,000 each, which kindly discount, depositing proceeds to our account at

> Exchange National Bank, Spokane, Washington, advising us of the amount of discount."

The capitalization of the trust company was only \$10,000. (Rec. 218.) That the trust company would get the \$100,000 to be advanced from the Exchange National Bank was talked over and understood at the Minneapolis meeting. (Rec. 217, 276-280.) The Exchange National Bank signed the trust deed as creditor for \$6,000 (Rec. 57), and that was the total indebtedness owing to it by the bankrupt.

The statement in the appellants' brief, page 10, that the Exchange National Bank kept in touch with the affairs of the bankrupt, is incorrect. On the other hand, Merrill, Cox & Company had had before this an accountant go over the books of the bankrupt. *None of the creditors who signed this trust deed gave any testimony during the trial, either in person or by agent or representative, except per Sigmund Katz.*

The statement on pages 10 to 12 of appellants' brief about the account of the bankrupt with the Exchange National Bank is not correct and will be gone into quite fully hereinafter.

The suggestion on page 12 of appellants' brief that Mr. Coman knew any more about the "precarious financial condition" of the bankrupt than did the other creditors in Minneapolis, is incorrect.

The statement on page 28 of appellants' brief

that the trust company is a "subsidiary" of the Exchange National Bank, is incorrect, unless the following facts make it such. Mr. Coman is the president of the bank and a member of the board of the trust company. The other members of the board of the trust company except Mr. Rea are also on the board of the bank, and officers thereof. The evidence does not disclose who owns the stock of either concern.

The statement on said page 28 that "every statement as to assets and liabilities" of the bankrupt has been false and that the company had long been absolutely insolvent, is not supported by the record. The statements made by Mr. Gibbs at Minneapolis or elsewhere as to the assets, either writen or oral, are not in the record.

The evidence does not disclose that the trustee in bankruptcy had converted the assets of the bankrupt into cash at the time of the trial. Of course some of the assets have been converted into cash, but some have not.

During the progress of the trial before the Referee, and because of objections made by counsel that the trust company could not have the preference because it did not take the $100,000 out of its own vaults but got the same from the bank, the bank filed a petition setting forth the facts and praying that the claim be allowed in the name of the trust company. The signing creditors answered

the petition and the two matters were consolidated. (Rec. 22, 60, 235, 275-6.)

The petition of the trust company, as well as the petition of the bank, asked that this claim of $100,-000 and interest be a preferred claim as against the trust, and if that be denied, that then the claimant be adjudged "entitled to have any and all dividends and sums that may be found by this court to become due and payable to the persons and corporations hereinabove particularly mentioned as signing said agreement, until the full amount of advancements as hereinabove set forth, together with interest at six per cent. per annum, be paid to the claimant herein, and before any money whatsoever from said estate are applied in liquidation and satisfaction of any of the indebtedness of the above-named creditors." This is based upon the provisions, terms and conditions set forth in the trust deed made on February 1, 1916.

Other facts will be referred to hereinafter.

ARGUMENT.

Objections to the allowance of the claim of the trust company were filed by the trustee in bankruptcy and also by all of the signing creditors except Mr. Stack. As stated above, only three of said signing creditors are now appealing. The objections of the signing creditors are thirteen in number. (Rec. 18-20.) Those numbered 4, 6, 8, 9, 10, 11, 12 and 13 may be summarily disposed of.

Nos. 4 and 6 are to the effect that the trust deed was not executed by the objectors or by the trust company, and that the trust company did not extend the Dryad mortgage as provided in said trust agreement. The evidence was to the contrary, and those objections are now waived.

No. 8 is to the effect that the trust company caused the bankruptcy proceedings to be instituted. There is no such evidence. It is not true. The bankruptcy proceeding was instituted by Merrill, Cox & Co and the Fort Dearborn National Bank and one creditor who did not sign the trust agreement.

Nos. 9 and 10 are to the effect that the trust company *negligently* collected the debts of the company and was guilty of gross neglect of the trust imposed on it. There is no evidence to sustain any such charge. The entire record shows the contrary. We believe there is no such contention in appellants' brief, but if there is, it will be noticed when reached.

No. 11 states that the signing creditors are not bound by the trust deed because of false and fraudulent representations made by "C. D. Gibbs, Stacks-Gibbs Lumber Company and Dryad Lumber Company." Manifestly, as between the trust company and said creditors, this charge, if true, would be wholly immaterial, but there is no such evidence. None of the creditors signing the trust agreement

have given any testimony on any subject in relation to this controversy. There is no contention in the objections that either the trust company or the Exchange National Bank made any representations of any kind. Furthermore, there is no evidence on that subject.

Nos. 12 and 13 are to the effect that the trust company did not comply with the laws of the State of Idaho relating to foreign corporations. The evidence shows to the contrary, and during the hearing the point was waived. (Rec. 256.)

The *objections* which require any notice or comment will therefore be divided into three heads:

> 1. That the United States District Court, sitting in bankruptcy, had no jurisdiction to determine the rights of the trust company and bank as to any part of the fund as against the creditors signing the trust deed. (Objections No. 1.)
>
> 2. That the trust company is not the owner of the notes attached to its petition; that it did not loan the money represented by said notes; that it did not advance $100,000 or any part thereof under the terms of the trust agreement. (Objections 2, 3 and 7.)
>
> 3. That the trust deed was not signed by creditors representing 90% in amount of the indebtedness of the bankrupt. (Objection No. 5.)

The charge of *bad faith* now contained in appellants' brief and so vehemently discussed on pages 95 to 116 thereof is *not* alleged in the formal and

explicit *objections*, nor is any such objection found in the record.

During the progress of the hearing and because of the frequent objections that the trust company was not the real party in interest, the Exchange National Bank filed a petition herein setting forth the same facts in substance as those contained in the petition of the trust company, and prayed that the claim of the trust company be allowed to the trust company and that the trust company have a preference as prayed for therein. (Rec. pp. 22-30.)

It is stated in said petition:

> "This petition is made and filed for the purpose of removing any possible doubt as to the party who is entitled to have said claim allowed, and any and all possible technical objections in relation to said claim of the Mechanics Loan & Trust Company."

The trustee and the signing creditors, namely, these appellants and others, filed a formal answer to said petition. (Rec. pp. 60-64.) That answer admits the execution of the trust deed, the corporate capacity of the bank and the trust company, and denies that the trust company advanced or caused to be advanced to the bankrupt the sum of $100,000 or any part thereof, and affirmatively alleges as follows: That the notes referred to were made by the bankrupt, payable to the trust company, and the trust company "endorsed said notes without recourse and said notes were then delivered to the Exchange National Bank of Spokane,"

and that the bank, upon the receipt thereof, advanced to the bankrupt the amount of said notes less the discount, and that the trust company never received any consideration from the bank nor paid any consideration to the bankrupt on account of said notes, and that

> "these respondents therefore deny that the Mechanics Loan & Trust Company is entitled to any preference of any kind or character as averred, and aver that the owner of said notes is the Exchange National Bank of Spokane, Washington, and that it is not entitled to any lien of any kind or character upon any of the assets of the Stack-Gibbs Lumber Company or of any moneys now in the hands of the trustee or to any dividend or dividends payable to any other creditor or creditors whomsoever, and these respondents deny that the Exchange National Bank or the Mechanics Loan & Trust Company are entitled to any relief whatsoever, and pray that the petition of said Exchange National Bank be dismissed at the cost of the petitioner."

Thereupon the record shows the following, pages 275-6:

> "Counsel for the objectors stated that they had filed answers to the petition of Exchange National Bank. Counsel for all parties stipulated that the petitions of the trust company and the bank and the proceedings thereon might be consolidated.
>
> THE REFEREE: The record may show that the amended claim of the Mechanics Loan & Trust Company and the petition of the Exchange National Bank, being consolidated, are to be tried together and considered together as one proceeding."

We call attention to this at this place for the purpose, among other things, of pointing out to the court that the formal answer, verified and filed February 20, 1917, like the formal amended objections vertified and filed January 6, 1917, *contains no charge of bad faith* on the part of either the bank or the trust company, and that this charge in the appellants' brief is not properly for consideration by this court. That issue was never tried.

In considering each and every one of these objections, we submit that the court should have in mind the principle stated in the case, In re Chase, 124 Fed. 753, quoted with approval by the Supreme Court of the United States in Hurley, Trustee in Bankruptcy v. Atchison, Topeka & S. F. R. R., 213 U. S., p. 132, as follows:

> "In In re Chase, 59 C. C. A., 629, 631, Circuit Judge Putnam, delivering the opinion of the Circuit Court of Appeals of the First Circuit, says: 'It is settled that a trustee in bankruptcy has no equities greater than those of the bankrupt, and that he will be ordered to do full justice, even in some cases where the circumstances would give rise to no legal right, and, perhaps, not even a right which could be enforced in a court of equity as against an ordinary litigant. Williams' Law of Bankruptcy, 7th Edition, 191. Indeed, bankruptcy proceeds on equitable principles so broad that it will order a repayment when such principles require it, notwithstanding the court or the trustee may have received a fund without such compulsion or protest as is ordinarily required for recovery in the courts either of common law or chancery.'"

JURISDICTION.

The appellees are not seeking to obtain a lien upon any money *in custodia legis* by the process of attachment or writ of granishment, which is the point involved in nearly all of the cases cited by the appellants. The trust deed signed by the bankrupt and all of the large creditors of the bankrupt grants to the trust company two specific rights whereby the trust company can recover back all moneys advanced and all expenses and legitimate disbursements:

(a) A lien upon all of the property of the bankrupt.

(b) An equitable assignment of the claims of the signing creditors. .

The Referee held that the trust company could not enforce its lien as against the whole estaate of the bankrupt, but could enforce it as against the signing creditors. The signing creditors do not contend for the invalidity of that part of the Referee's decision which denies enforcement against the whole estate.

It is apparent that if Judge Dietrich's decision affirming the Referee's order is overturned, the trust company and the bank are practically without any relief. The signing creditors reside in almost as many different states as there are creditors, at least five different states. If there is any remedy at law, it is wholly inadequate.

One of the cases cited by appellants is In re Hollander, 181 Fed. 1019. The question involved was whether or not permission will be granted to *attach* in the hands of a trustee money belonging to a creditor of the bankrupt. In accordance with the weight of authority, the application is denied, but in the opinion the court states the following principle:

> "Where there are two or more persons who claim to be entitled to a fund in the possession of the court, or who claim to have liens upon that fund, the court necessarily has jurisdiction to decide upon their relative claims and contentions."

This question of jurisdiction is settled beyond controversy by the Supreme Court of the United States in Whitney v. Wenman, 198 U. S. 539, the court saying at page 552:

> "We think the result of these cases is, in view of the broad powers conferred in section 2 of the bankrupt act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein. This conclusion accords with a number of well-considered cases in

the Federal courts. In re Whitener, 105 Fed. Rep. 180; In re Antigo Screen Door Co., 123 Fed. Rep. 249; In re Kellogg, 121 Fed. Rep 333. In the case of First National Bank vs. The Chicago Title & Trust Company, decided May 8 of this term, ante, p. 280, in holding that the jurisdiction of the District Court did not obtain, it was pointed out that the court had found that it was not in possession of the property. Nor can we perceive that it makes any difference that the jurisdiction is not sought to be asserted in a summary proceeding, but resort is had to an action in the nature of a plenary suit, wherein the parties can be fully heard after the due course of equitable procedure."

One of the cases cited in the above opinion is In re Antigo Screen Door Co., 123 Fed. 249. In that case the court said at page 251:

"We take it that any court, whether one of equity, common law, admiralty or bankruptcy, having in its treasury a fund touching which there is dispute, may, by virtue of its inherent powers, determine the right to the fund thus in its possession. Jurisdiction in that respect is an incident of every court. Havens, et al., v. Pierek, Trustee, 120 Fed. 244; In re McCallum, 113 Fed. 393. If otherwise, every court would be subject to the control of the coordinate courts, working havoc to the independence of judicial authority. A fund so possessed is in *custodia legis*, and right to it may only be asserted and determined in the court which possesses it."

To the same effect is the opinion in the case, In re Whitener, 105 Fed. 180, also cited in the Supreme Court's opinion.

The case, In re Paris Modes Company, Bankrupt, 196 Fed. 357, is very like the case at bar. There was a distribution of the fund between the parties according to a certain agreement made between them, which was enforced by the court in bankruptcy.

The distinction between a garnishment or an attachment and the equitable distribution of a fund in the bankruptcy court, according to the claims of the respective parties thereto who have appeared in the bankruptcy court, is clearly stated by the Supreme Court of Maine in Rockland Savings Bank v. Albin, 68 Atl. 863.

The authorities cited by the appellants in no manner militate against our position. The first cited case is to the effect that the Federal Court sitting in bankruptcy is a court of limited jurisdiction. (Appellants' Brief, 33-36.)

The United States District Court is, of course, a court of limited jurisdiction. In fact, as said by the Supreme Court of the United States in Windsor v. McVeigh, 93 U. S. 274, 282:

> "All courts, even the highest, are more or less limited in their jurisdiction. They are limited to particular classes of action. * * * Though the court may possess jurisdiction of the cause, of the subject-matter and of the parties, it is still limited in its modes of procedure and in the extent and character of its judgments. It must act judicially in all things and cannot then transcend the power conferred by law."

In the Taft case, 141 Fed. 369, cited in appellants' brief, at page 33, the question was as to the sufficiency of the petition in involuntary bankruptcy. The court held that the petition was insufficient, but nevertheless held that the petitioner should be given an opportunity to amend his petition so as to comply with the statute.

In the Edelstein case cited in appellants' brief, page 34, this person was found guilty of making a false oath in relation to the bankruptcy proceeding against himself and his partner. The defense was that the court had no jurisdiction of the bankruptcy proceedings. The court found that the petition in involuntary bankruptcy was insufficient, but that hearing had been had thereon and adjudication of bankruptcy made, and the bankrupt had applied for a discharge from his debts, and that the judgment was not void and not subject to collateral attack. The conviction was affirmed.

In the case, In re Columbia Real Estate Co., 101 Fed. 965, cited in appellants' brief, page 34, what the court said at page 970 is:

> "If, as insisted by counsel, the bankruptcy court is, in a technical sense, a court of inferior and limited jurisdiction, every fact essential to its jurisdiction must affirmatively appear on the face of the record. It is true, the bankruptcy court is one of limited jurisdiction, and the Constitution describes all courts of the United States except the Supreme Court as inferior courts. But the Circuit and District Courts of the United States as courts of bank-

> ruptcy are courts of record, and as such, are not inferior courts in the sense that jurisdiction must necessarily appear upon the face of the record."

That the case, In re Girard Glazed Kid Co., 136 Fed. 511, cited in appellants' brief, page 36, does not support appellants' position, but in fact supports appellees' position, is apparent from a careful reading of the opinion. The court said that the controversy

> "concerns a sum of money that came into Barbara Swartz's possession at that time (before the petition in bankruptcy was filed) and has remained in her possession ever since;"

also,

> "It is an independent controversy about the ownership of money *that is not a part of the fund for distribution,* and this court cannot take jurisdiction of the dispute and decide it in the roundabout manner that has been suggested."

In other words, the moneys in controversy were not and never had been in the possession of the trustee in bankruptcy.

In the case at bar, each and every one of the parties to this proceeding is in the bankruptcy proceeding as a creditor who has filed a claim therein. Here particular creditors, the trust company and the bank, assert that there was advanced $100,000 and the same was used for the benefit of the bankrupt and the creditors signing the trust deed, and that the same was done at the instance of said sign-

ing creditors under a written contract (trust deed) whereby it was agreed that the trust company should have a prior and preference claim for the moneys advanced and expenses incurred and that the same should constitute a charge upon the trust estate superior to and to be paid before any moneys were paid out of said trust estate to said signing creditors. In other words, that said trust company has by virture of the contract become assignee in equity of the claims of said signing creditors and of the fund which would otherwise go upon distribution to said signing creditors, and that said fund is in the hands of the trustees in bankruptcy. No court has held contrary to our contention, and the principles enunciated in all these decisions sustain the same.

That the assignee of a claim against a bankrupt has the right to file and enforce his rights in the United States District Court sitting in bankruptcy, cannot be questioned. Otherwise he would be without remedy. See:

> *In re Miner,* 114 Fed. 998;
> *In re Miner,* 117 Fed. 953 (On Rehearing);
> *In re Breakwater,* 232 Fed. 375.

The distinction between such a case and a case where an outsider sues at law and undertakes to create a lien in *custodia legis* through legal process, either garnishment or attachment, is recognized by all the authorities, and a very lucid discussion thereof is contained in the opinion of the Supreme

Court of Maine in the Rockland Savings Bank case, 68 Atl. 863, cited above.

The case in 211 Federal (appellants' brief, p. 39) and the two cases (appellants' brief, p. 41) and the case in 187 Federal (appellants' brief, p. 42) are all either garnishment or attachment cases.

The statement on page 42 of appellants' brief that this proceeding is delaying the settlement of the bankruptcy proceeding is not supported by any evidence in the record and is untrue in fact.

The Nebraska case (State court), appellants' brief, page 43, is not in point. This appears to be an action brought by a trustee in bankruptcy in the State court against the estate of Hulst, deceased, and there is an interpleader by the State Bank of Columbus against the First National Bank, neither one of which appears to have been a party to the suit. The opinion does not decide the question of jurisdiction or any question as to procedure, but holds that the State Bank does not have the right to enforce the contract referred to against the National Bank because the National Bank was not a party thereto. A careful reading of the opinion will demonstrate its inapplicability.

The next question presented in appellants' brief is that inasmuch as the trust company in its petition claimed a preference lien on the entire trust estate, and if that was denied, a preference lien upon the claims of the signing creditors, or that

the proportion of the fund in the trustee's possession which would otherwise go to the signing creditors should be paid to the trust company until the trust company has received the full amount of its claim under the provisions of the contract, and the court having refused one relief, then the court is *without jurisdiction* to grant the other relief prayed for. (Appellants' Brief, pp. 43-44.) The mere statement of their contention demonstrates the absurdity thereof.

No court has ever held that because a pleader prayed for several kinds of relief and was denied one kind, that the court would refuse him any relief whatever. Counsel go further and contend not only that the court should refuse any relief whatever, but that the court has no *jurisdiction* to grant any relief whatever, because under the evidence one kind of relief must be denied.

They say that the lower court must have found the trust deed null and void. The Referee does not state in his decision the reason for denying a relief as against the trustee in bankruptcy. It may be that it was because of the letter signed by the large creditors directing the trust company not to put the trust deed of record and keep the same a secret; and that the trust company obeyed those instructions. (Rec. 219.) Of course the trust deed might not be enforcable against the non-consenting creditors, when it would be enforcable against the signing creditors. The appellants do not boldly

and baldly state that they are seeking to repudiate their own contract. Such is the fact, however.

Pages 45 to 61 of appellants' brief are devoted to quotations from authorities on the subject that when an action is brought in equity and the court refuses equitable relief, it will not enter a money judgment upon a note or for damages,—in other words, strictly legal relief,—and for the reason that to do so would be to deprive the parties of their constitutional right of trial by jury. Why the citation of these authorities, we know not, as their lack of relevancy to the instant case is apparent..

There are some exceptions to this well established rule, well known to the court, which are also unnecessary to comment upon herein.

The decisions of the Supreme Court of the United States noted in the authorities cited have been referred to in a more recent case of that court which is something like the case at bar, and their inapplicability pointed out. (Tyler v. Savage, 143 U. S. 79, 96.)

In the case last cited is an expression of that court which is quite pertinent:

> "Under Section 723 of the revised statutes, the remedy at law, in order to exclude equity, must be as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity."

In Walla Walla v. Walla Walla Water Company, 172 U. S., pages 1, 12, the court said:

> "This court has repeatedly declared in affirmance of the generally accepted proposition that the remedy at law, in order to exclude a concurrent remedy in equity, must be as complete, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity."

Manifestly, a remedy at law to be efficient must be a remedy in the same jurisdiction, not in some foreign jurisdiction.

In the instant case, either the trust company has a remedy in this proceeding or it is without remedy. It would be neither practical nor efficient to bring a suit in Nebraska against appellant Searle, another suit in Illinois against Merrill, Cox & Company, another against Minnie A. Gibbs (residence unknown), another against Fort Dearborn National Bank, Illinois, another against First National Bank of Lincoln, Nebraska, another against Shoshone Lumber Company and Idaho Timber Company, each Minnesota, another against J. K. Stack, Michigan, and so on. If such suits were brought, they would be in equity to establish the trust company's right to that part of the fund of the bankrupt estate otherwise going to the defendant therein under said agreement. The trustee in bankruptcy must be a defendant in order to obtain the fruits of a victory. His residence is in the State of Idaho. This would not be "efficient to the ends of the justice and its prompt administration" nor practical, or adequate. The only practical pro-

ceeding is one which brings in the trustee in bankruptcy and all the signing creditors in one proceeding. The only way possible to do that is in this bankruptcy proceeding and by the method adopted herein. To deprive the appellees of this procedure would be to deprive them of all remedy.

On page 59, brief, appellants cite the Henry case, 145 Fed. 316. The following quotation therefrom shows its impertinence:

> "This is not a case in bankruptcy in any sense of the word. It is not contended that either the plaintiff or defendant were parties to the proceeding before the referee in bankruptcy."

In the instant case all of the parties were parties to the proceeding in bankruptcy. They were all creditors and in court. It was the duty of the trustee to distribute the fund to the parties who had a right thereto. It was the duty of the court to determine that question.

On pages 62 to 65, brief, appellants criticise Judge Dietrich, and in doing so, misstate the record, due, doubtless, to their lack of appreciation thereof. It is true that counsel for the appellants made an oral argument and filed an extensive brief with Judge Dietrich. The expression quoted at page 62, brief, begins near the bottom of page 84 (Record). To get the connection and appreciate what the learned judge refers to, you must turn to the bottom of page 83, Record, where he says:

> "Thus far I have not referred to contention

> made by counsel 'for creditors whose debts were incurred by the trustee,' "

and so on.

It is a fact, well known to the author of appellants' brief, that Mr. Whitla, as attorney for some of the creditors whose debts were created between February 1st, the date of the trust deed, and July 29th, the date of the bankruptcy proceeding, and now unpaid, made an oral argument before Judge Dietrich and filed a brief with him. He is the counsel and those are the creditors referred to in the quotation made above and in the quotation made in appellants' brief. Counsel must have forgotten that; otherwise they would not have indulged in this criticism of Judge Dietrich.

REAL PARTY IN INTEREST AND RIGHTS OF BANK AND TRUST CO.

Under this heading we will discuss the two points made in appellants' brief, pages 65 to 95. It is contended therein, first, that certain evidence was inadmissible, and that inasmuch as the trust company did not get the $100,000 out of its own vaults but got it from the vaults of the Exchange National Bank, neither party would have a right to the adjudication complained of except for this inadmissible evidence; and second, that the bank is a mere volunteer, and even though the evidence complained of were admissible, that neither the trust company nor the bank could recover herein.

Appellants have a long and learned discussion on the subject of *subrogation*. As we deem that the principle of subrogation is not involved in this matter, but quite a different principle, which we have discussed below, we make no further reference thereto.

Paragraph 1 of the trust deed provides that the trustee shall have the power "to incur all proper expenses in connection therewith as in its judgment shall seem to the best interests of all the parties hereto, as though it was the absolute owner thereof." (Rec. 40.)

Paragraph 2 provides that the trustee may operate the mills, cut logs, etc., "and in carrying on such business it may incur such expense as it thinks necessary."

Paragraph 3 provides that the trustee may employ such persons as it deems necessary and "may pay persons so employed reasonable compensation."

Paragraph 6 provides a compensation for the trustee, and that the trustee "shall be entitled to reimbursement for sums paid for legal services."

Paragraph 8 provides that the trustee may bring or defend any suit which it considers advisable to the protection of the trust estate, and "it shall be repaid from the trust estate all liability, cost and expense to which it may be put in the course of such litigation."

Paragraph 9 provides that if in the management of the estate damage is done to third parties to whom the trustee may be held liable, "the trustee shall be reimbursed and indemnified against any liability or claim therefor."

Paragraph 10 provides:

> "The trustee shall advance such sums of money as it shall deem necessary to meet the present payroll of the lumber company and the mill company and to discharge the claims of the creditors who do not execute this instrument as it may deem necessary or requisite to protect the trust estate, not to exceed, however, the sum of $100,000, and the trustee shall have a first and preference claim upon said trust estate for the amount of such advancement, and the same shall be repaid to it out of the first proceeds of sale of the trust property or any part thereof or the first proceeds of any of the collected accounts or bills receivable, together with interest thereon from the date of such advancement at the rate of 6% per annum."

Paragraph 11 provides that payments made by the trustee under the provisions of Section 1 to 10, as well as the compensation of the trustee, "shall be deemed maintenance charges of the trust estate and shall be paid from the proceeds of the trust estate *in preference to any other claims thereupon.*"

Paragraph 14 provides that this instrument is entered into in pursuance of a plan which is considered equitable between all the creditors of the

lumber company and the mill company, and which will secure the most advantageous disposal of the property for the benefit of the creditors, and that the creditors agree not to sue either company, and "that the trustee would not have consented to act as trustee hereunder or to assume the obligations herein assumed by it except upon the express agreement of the creditors in this section contained."

Paragraph 15 provides that the trustee may employ agents and that it shall not be held liable for any neglect, omission, mistake or misconduct of any such agent, and "shall not be held liable for any loss or damage not caused by its own negligence or default."

Paragraph 18 provides that the creditors signing the said instrument shall file with the trustee their claims against each company and that "the proceeds of the trust estate, after reimbursing the trustee for advancements, expenses, compensation and other claims mentioned herein, shall be distributed pro rata among the creditors."

Paragraph 19 provides that "the compensation of the trustee and expenses incurred and advancements made by it shall constitute a charge upon the trust estate *superior to the indebtedness of any party secured hereby*, and the trustee may not be removed nor be deprived of the trust estate in any manner until the payment of" same. It also provides that in case the trustee named shall refuse to

act, the creditors signing the instrument, by a majority vote, may appoint a new trustee.

It is not stated in the instrument that the trustee must pay every expense incurred and take every advancement made out of its own coffers, and that if it borrowed any of the moneys so paid or advanced it would not have any lien for the repayment thereof under this instrument. Manifestly, neither the creditors nor the bankrupt had any such absurd idea. Such, however, is the argument of counsel. What every court seeks to ascertain in construing a contract is the intention of the parties. It was of course immaterial either to the bankrupt or the objecting creditors where the money came from. The purpose and intent of the contract was to have somebody advance such sum of money as the trustee might think necessary, with a limit of $100,000, and that the Trust Company or such creditor should have a first lien upon the assets of the bankrupt and a first lien upon the interests of the signing creditors. For repayment of same such lien or charge being given as an inducement to advance the money. The habendum clause in the trust deed has the expression, "and its assigns."

In Washington & Idaho R. R. Co v. Coeur d'Alene R. R. Co., 160 U. S., page 77, it is said at page 101:

> "When a court of law is construing an instrument, whether public law or private contract, it is legitimate if two constructions are

> fairly made possible to adopt that one which equity would favor."

In Utley v. Donaldson, 94 U. S. 29, the Supreme Court said at page 46:

> "Every intendment is to be made against the construction of a contract under which it would operate as a snare."

In Secombe v. Steele, 20 Howard, 94, the Supreme Court used the following language:

> "In Parkin v. Thorald, (16 Beav., 59) the master of the rolls said: 'A contract is undoubtedly construed alike both in equity and at law; nay, more—a court of law is the proper tribunal for determining the construction of it. But courts of equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it find that, by insisting on form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance. For instance, A has contracted to sell an estate to B, and to complete the title by the 25th of October; but no stipulation is introduced, that either party considers time of the essence of the contract. A completes the title by the 26th; at law the contract is at an end, and B may bring an action for the non-performance of the contract, and obtain damages for the breach; but equity holds, that unless B can show that the delay of twenty-four hours really produced some injury to him, he is not to be permitted to bring this action or to avoid the performance of the contract; not, certainly, on the ground that the 25th of October was not a part of the contract, but on the ground that it is unjust that B should escape the performance of a contract which has been substantially per-

formed by A, by reason of some omission in a formal but immaterial portion of it.' Upon a view of the chancery record, our conclusions are, that the plaintiff, in good faith, attempted a literal performance of his contract with Taylor; that the deposit of the money due, in a bank of solvency and credit, other than those named in the contract, did not inflict an injury upon Taylor, and the offer of its certificate of deposit, *prima facie,* was a substantial performance of its requirements."

In Joy v. St. Louis, 138 U. S., pages 1, 38, the court said:

"The two agreements of August 11, 1875, and the deed of that date from the County Company to the Kansas City Company constituted a single transaction relating to the same subject-matter, and should be construed together in such a way *as to carry into effect the intention of the parties, in view of their situation at the time, and of the subject-matter of the instruments.*"

In Insurance Co. v. Dutcher, 95 U. S. 269, 273, the court said:

"The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done. Self-interest stimulates the mind to activity and sharpens its perspicacity. Parties in such cases often claim more but rarely less than they are entitled to. The probabilities are largely in the direction of the former. In considering the question before us, it is difficult to resist the cogency of this uniform practice dur-

ing the period mentioned as a factor in the case."

In this connection we call attention to the fact that the notes were always given to the trust company; that with each note was a letter signed by Mr. Katz, who was sent to have charge of this trust by these objecting creditors, and that the letters universally requested the trust company to discount the notes at the Exchange National Bank and have the money put to the credit of the bankrupt (Rec. 185), and that Mr. Katz repeatedly wrote Merrill, Cox & Company and others that the moneys thus obtained were advanced under and in pursuance of the trust agreement; that no objection was ever made by an creditor to this method of procedure, and that the bankrupt itself knew the entire transaction and acquiesced in it. That the objection made is without substance is apparent. The signing creditors, as well as the bankrupt, are presumed to have some knowledge as to the financial condition of the trust company and its capacity to carry the contract. The situation of the affairs relating to a contract at the time the contract was made is always admissible in evidence as an aid to the court in determining the intention of the parties, which is most often poorly expressed in the written language.

The trust company was capitalized for only $10,-000 and had but little financial standing. The parties were presumed to know this. Anyway, they

were so told by Mr. Coman at the time the trust deed was in preparation.

Mr. Coman was neither president, vice-president, secretary or treasurer of the trust company. He was, however, a member of its board of trustees. He was president of the Exchange National Bank. Counsel state that the trust company was a subsidiary of the bank. Anyway, the close affiliation was a matter of common knowledge. The president of the trust company was the vice-president of the bank. The trust company, having very little means, would naturally go to the bank to borrow the money to be advanced. Mr. Coman testified that that was talked about at the time the contract was being prepared. Counsel make serious objection to this testimony. It does not vary or change the terms of the written contract. It is patent without the testimony that the parties understood exactly what would be done. That is shown by the correspondence and by the conduct of their representative, Mr. Katz.

There can be no controversy over the fact that the trust company would have had the right to have repaid these advancements and expenses provided it had realized out of the sale of the assets, before it was superseded in bankruptcy, a sufficient sum of money to pay the same. The contention is that, not having actually paid the money, and although the advances were all made in absolute good faith and in reliance upon the trust deed,

neither the trust company nor the bank can have a preference claim.

In Randolph v. Scruggs, 190 U. S. 533, the question of the right of a bank in its own name to proceed against the trust fund was passed upon. A mercantile company made a general assignment for the benefit of its creditors. The assignee accepted the trust. The deed of assignment provided that the assignee should pay reasonable attorney's fees for preparing the deed and for advice and services to be furnished in the course of administration. Within four months after making this deed of assignment, the mercantile company was adjudicated a bankrupt. The attorneys filed a claim in the bankruptcy court for professional services rendered in preparing the deed of assignment, etc. Certain questions were certified to the United States Supreme Court. On the question of the right of the attorneys to file a claim in their own name, the court said at page 538:

> "We may assume that there is no question of form before us and that whatever the appellants' properly might have been paid by the assignee, they may make proof for now."

Citing among other cases, Mason v. Pomeroy, 151 Mass. 164; 24 N. E. Rept. 202.

The Supreme Court also said on page 539:

> "The services to the voluntary assignee may be allowed so far as they benefited the estate, and inasmuch as he would be allowed a lien on the property if he had paid the sum allowed,

> the appellants may stand in his shoes and may be preferred to that extent."

It is immaterial whether such lien is asserted by the trust company or the bank, inasmuch as both of them are in court in this proceeding, both asking to have it asserted, and there is no conflict between them, and which one of them gets the money is a matter in which neither the bankrupt nor the signing creditors can have any interest.

The Massachusetts case cited in the Supreme Court decision is instructive. A bill in equity was filed by certain creditors to establish a lien upon a trust fund. It appears from the opinion that Mr. Pomeroy by his will devised a manufacturing plant to three trustees in trust to continue and carry on the business until his son's arrival at the age of 21 years. The bill was demurred to because (a) the plaintiffs had no equity, as they did not offer to make good to the trust fund the losses occasioned by the trustees, and (b) that the plaintiff's sole remedy was at law. The court said:

> "Where trustees are authorized to carry on a business and contract debts, they are not only liable personally for the payment of them, but the creditors may also resort to the trust fund, subject, however, to the rules of equity as applicable to the facts and circumstances which may exist in any case."

That court also said:

> "The view, however, which has prevailed in England, so far as the question has been discussed, is that the creditors may reach the trust property when the trustees are entitled to

> be indemnified therefrom, and that the creditors reach it by being substituted for the trustees and standing in their place."

Citing among other cases, In re Johnson, 15 Chancery Division, 548, which is in point.

In re Chase, 124 Fed. 753, is cited in the United States Supreme Court decision referred to above, Hurley Trustee v. A. T. and S. F. R. R., 213 U. S. 132. That case is pertinent. A storekeeper made a general assignment for the benefit of creditors. The assignee took possession and held the same until the assignor was adjudicated a bankrupt. The assignee was petitioner in bankruptcy for compensation for disbursements and for services. The court held that the assignee had a lien for disbursements and the reasonable value of services. The second head note is:

> "That such assignees paid to the trustee in bankruptcy the gross amount received by them and surrendered all other assets in their answer did not deprive them of the right to apply to the court for the payment of the amount of such lien."

The fourth head note is:

> "An assignment for the benefit of creditors fairly made and intended to facilitate the equal distribution of the insolvent's property among his creditors without any attempt to defraud or embarrass persons to whom he was indebted, is not contrary to the policy of the bankrupt law, as to preclude the assignee from recovering for disbursements and services made for

the benefit of the estate prior to the filing of the bankrupt's petition."

The third head note states the principle cited with approval in 213 U. S., page 132, as follows:

> "The rule applied that trustees in bankruptcy have no equities greater than those of the bankrupt and sometimes will be ordered to do full justice even in some cases where the circumstances give rise to no legal rights and perhaps not even to a right which could be enforced in a court of equity as against an ordinary litigant."

The court said on page 760 as follows:

> "On the whole, it is plain that, under the special circumstances of many cases of this character, there may arise a strong equity in favor of such allowances as are now claimed, and that there is no provision of statute, and no declaration of any court of authority, holding that, as a matter of law, they should never be granted. On the other hand, so far as there are any indications which we are bound to regard, they are to the contrary. Therefore, in the present case, the District Court should ascertain and determine whether, under all the circumstances, the petitioners are equitably entitled to their disbursements, or any part thereof, reasonable allowances for their services, and protection against outstanding claims for rent. None of these matters should be disposed of on any arbitrary rule of law that neither class of allowances can be made, but they should be determined according to what is reasonable and equitable in view of all the conditions.

Since this was prepared, the Supreme Court passed down its opinion in Randolph v.

> Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed............, which assures us that the conclusion reached herein is correct. Nevertheless, Randolph v. Scruggs does not cover all the details involved at bar. Moreover, the directions and accompanying explanations herein contained seem necessary for the guidance of the District Court. We note, however, that Randolph v. Scruggs, at page 539, 190 U. S., page 712, 23 Sup. Ct., 47 L. Ed............, is careful to hold that an equitable and reasonable allowance for the services of assignors like the petitioners is for only such as have 'benefited the estate.' Therefore that limitation, and all the phraseology of the opinion in Randolph v. Scruggs, must be understood as adopted by us. Summers v. Abbott, 122 Fed. 36, decided by the Circuit Court of Appeals for the Eighth Circuit, sustains our conclusions, although it omits the limitation imposed by the Supreme Court."

It has not been and cannot be suggested that the advancement of the $100,000 was not a benefit to the estate. Judge Dietrich, as well as the Referee, expressly so held. But that question can have no relation to the agreements between the creditors themselves. The signing creditors having agreed that the advancements should be a charge against their dividends, and having appointed an agent to run the business, could not claim that such lien should not be enforced because of any mistakes of such agent or because the business did not turn out as well as anticipated. The trust agreement contains no such limitations. On the other hand, it provides that the trust company shall be protected from loss.

See Atchison, Topeka & S. F. R. R. Co. v. Hurley, 153 Fed. 503. The first head note is:

> "The administration and distribution of the property of bankrupts is a proceeding in equity and should be conducted on broad equitable lines, with a view of recognizing and enforcing the rights of all parties claiming an interest in the estate, whether they be legal or equitable, or both."

The third head note is:

> "Equity will not permit the statute of frauds to be invoked in favor of a party who has not performed his oral undertaking against one who, at his invitation and in reliance on his promise, has expended money and changed his situation."

This last quotation bears upon the conversation between Mr. Coman and the signing creditors in Minneapolis, wherein they all understood that the trust company had very little funds and the bank was to advance the money. In the opinion the court says at page 509:

> "We find it unnecessary to consider the interesting question debated at the bar, whether the oral agreement was such a substantial modification of the original one as distinguished from a change in detail of performance, as required it to be in writing and conform to the statute in question. It sufficiently appears that the railway company fully performed its part of the agreement. It advanced the money as agreed, but the coal company failed to repay it as agreed. Equity will not permit the statute of frauds to be invoked in favor of a party who has not performed his oral understanding against one who, at his invitation and in reliance upon his promise, has expended

money and changed his situation. That would make the statute an instrument of fraud rather than a means to prevent it. It cannot be so employed."

In relation to this question of the admissibility of the oral testimony of Mr. Coman as to what was said at Minneapolis about the bank advancing the money at 6% interest and having the benefit of the charge or lien under the terms of the trust deed, (Rec. 276-280) we beg also to cite Ford v. Williams, 21 Howard 289, wherein, in the opinion, it is said:

> "The contract of the agent is the contract of the principal, and he may sue or be sued thereon though not named therein; and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parole, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction."

This case has been often cited. See the following:

Curran v. Holland, 75 Pac. 46;
Escondido Oil & Dev. Co. v. Glaser, 77 Pac. 1040;

Battey v. Lunt, Moss & Co., 30 R. I. 2; 136 Amer. St. Repts. 926.

Bramble v. Brett, 230 Fed. 385, is quite similar to the case at bar. Stalcup, an insolvent merchant, met his creditors and made a trust deed of substantially all his property to Bramble, in trust, to

take possession, sell merchandise, pay creditors, etc. Bramble took possession and thereafter Stalcup was adjudged a bankrupt. Bramble filed a claim in bankruptcy, seeking to be paid out of the estate "before the distribution to creditors" a certain sum of money for services, a certain other sum for services for his attorneys, and expenses for running the business, and a certain sum for merchandise which he had purchased *and which he had not paid for.* The Circuit Court of Appeals for the Eighth Circuit held that Bramble, having acted in good faith, was entitled to be paid for all legitimate expenses and compensation, etc. The point was made that he had not paid the grocery company, but the court said:

> "The court will presume that he will pay the grocery company for the merchandise for which he owes it, upon his receipt of the money therefor, and it will be less expensive and more beneficial for the creditors of the estate to receive the adjudication of the rights of these parties and a disposition of this entire matter now than to leave it in a condition for continuing litigation upon a new claim presented by Bramble or by the Grocery Company."

Fairland v. Percy, 3 Probate & Divorce, p. 217, Ames' Cases on Trust, 2nd Ed., 423, is in point. The gist of the opinion is contained in the following quotation:

> "But the cases cited in argument show that where a testator by his will directs that his business may be carried on and that his per-

> sonal estate shall be used as capital with which to do so, the persons who after his death become creditors of the business, in addition to the personal responsibility of the individuals who give the orders for the goods or otherwise contract for the debt, are entitled in equity to claim against the estate of the testator to the extent that he authorized it to be used in the business."

In the same edition of Ames' Cases on Trust, Professor Ames has a note at page 432 as follows:

> "A trustee may stipulate by apt words that he shall not be liable personally, but only out of the trust moneys. In such a case the promisee cannot charge the trustee *de bonis propriis.* But he may reach the trust funds if the circumstances were such as to justify the trustee in pledging them for the benefit of the trust. Muir v. Glasgow Bank, 4 App. Cas. 337, 361, 365, 368, 369-70, 377, 386, 388; Campbell v. Gordon (Ct. of Sess, 1840), 2 D. 639; Johnson v. Leman, 30 Ill. App., 370; Glenn v. Allison, 58 Md. 527; Noyes v. Blakeman, 6 N. Y. 567; New v. Nicholl, 73 N. Y. 127; Perry v. Board, 102 N. Y. 99; Van Slyke v. Buch, 123 N. Y. 47; Stanton v. King, 8 Hun, 4; Fowler v. Mut. Co., 28 Hun, 195; Randall v. Dusenbury, 39 N. Y. Sup'r Ct. 174."

In O'Brien v. Jackson, 167 N. Y. 31, 60 N. E. 238, the court states the rule that an action cannot ordinarily be maintained by the creditor of an executor against him as executor, giving as one of the reasons therefor:

> "In an action at law against the executor, the legatees and persons interested in the estate have no opportunity to be heard."

This, of course, does not apply where the proceeding is in bankruptcy, as all the parties are parties to the proceeding and do have an opportunity to be heard, and did have such opportunity and were heard in the instant case.

The court in the New York case states the exception as follows:

> "To the general rule there are exceptions, and an equitable action can be maintained against the estate on behalf of a creditor in case of the fraud or insolvency of the executor or when he is authorized to make an expenditure for the protection of the trust estate and he has no trust funds for the purpose. In the latter case, if unwilling to make himself personally liable, he may charge the trust estate in favor of any person who will make the expenditure. Charges against the trust estate in such cases can be enforced only in an equitable action brought for the purpose."

In connection with that opinion, as well as the note of Professor Ames, we beg to remind the court that the notes in question were endorsed without recourse, showing that "it was unwilling to make itself personally liable," and furthermore, the trustee, although noti nsolvent, was without sufficient assets to pay the claim.

Much of the foregoing discussion is academic, as both the trust company and the bank are petitioners herein and the proceedings are consolidated and tried together and they both ask for the same relief,—that is, that the claim be allowed in the name of the trust company.

We have no doubt that the trust company itself, without the presence of the bank, would have the right to file this claim, and although it may seem unnecessary to discuss the question, we will cite a few authorities to the point.

That the holder of a promissory note may maintain an action thereon, even though he does not in fact own the same, has been decided by the Supreme Court of Idaho in Craig v. Palo Alto Stock Farm, 16 Idaho 701, and in Home Land Co v. Osborne, 19 Idaho 95.

In the cause entitled, In re Halsey Electric Generator Co., 163 Fed. 118, the court said:

> "It also appears that Murray and Van Slyck each hold an assigned claim, that neither of them has any financial interest in the claim held by him, and that each of them holds his claim solely for the benefit of his assignor. This fact does not, however, disqualify either of them as a petitioning creditor. The assignments were made by persons who originally claimed to be separate creditors of the alleged bankrupt for the respective amounts of the claims assigned. Murray and Van Slyck are trustees for their respective assignors, and, as they hold the legal title to the claims assigned, they are the owners of those claims, and, if they be valid claims, are creditors."

In Ohio Valley Bank v. Mack, 163 Fed. 155 (a bankruptcy case), an objection was made to a claim evidenced by a promissory note on the ground that the note belonged to a certain bank instead of the claimant. The court said:

> "Whether Stockhoff owns the debt in his own right or as trustee for the bank, he is entitled to prove it, for it stands as a debt and mortgage to him, and his relation as trustee for the bank is of no significance as an objection to the allowance of the claim."

Bramble v. Brett, 230 Fed. 385, has been cited above. That case holds that Bramble, the trustee, under an assignment for the benefit of creditors, could after the estate was placed in bankruptcy in the Federal Court file a claim for expenses and services even for a debt owed by him to a grocery company which had not been paid.

In Kent v. Dana, 100 Fed. 56, the third head note is:

> "A holder of negotiable municipal bonds transferable by delivery may maintain an action thereon in his own name although they were transferred to him by the former holder for that express purpose, and he is accountable to such former owner for the proceeds, and such right is not affected by a State statute requiring suits to be brought by the real party in interest, since he is vested with the legal title. In such case the fact may be shown for the purpose of permitting any defense which might have been made against the former holder, but beyond that, the defendant has no interest in the equities which may exist between the transferror and transferee."

In Salmon v. Rural Independent School District, 125 Fed. 235, 241, the court said:

> "The fact, therefore, that the plaintiff in this case is the agent of the beneficial owner, does not prohibit bringing the action in his

> name, and the delivery to him of the possession of the bonds, which in effect are payable to bearer, with the authority to enforce the collection thereof, clothes him with sufficient title to maintain action in his own name."

That case cites O'Brien v. Smith, 66 U. S. 99. The second head note is:

> "The holder of the check, being the cashier of an unincorporated banking association, and holding it for the use of the concern, may recover upon it in his own name."

The entire opinion in that case is in the following language:

> "We think the decision of the Circuit Court was right upon both of the points raised in the argument. The authorities referred to by the counsel for the defendant in error are conclusive, and it cannot be necessary to discuss here questions which we consider are too well settled to be now open to serious controversy."

We submit that it is clear from the authorities and the evidence that:

(a) Either the trustee or the bank is a proper party to file this claim, and inasmuch as both of them are in court in this proceeding and there is no controversy as between themselves, the question as to the better practice is purely an academic one and not of the slightest importance herein.

(b) The intention of the trust deed is that all advances and other expenses shall be a first charge against both the trust estate and the interest or dividends of the signing creditors.

(See trust deed, paragraphs 1, 2, 8, 9, 10, 11, 14, 18 and 19.)

(c) It was the intention of the trust deed that the trustee should not be personally liable. (Paragraphs 8, 9 and 15, trust deed.)

(d) It was immaterial either to the bankrupt or the signing creditors who advanced the moneys. The signing creditors knew that the trustee had no moneys of its own to advance and that the bank did have an would make the advancements and would make same in reliance upon the trust deed, and knew this before any advancements were made. It was not the intention of the signing creditors or the trust deed that the trust should fail because the trustee did not itself have the moneys to make the advancements, but that the trust should be carried out, and in order to carry it out, it was necessary that the moneys for advancement be obtained from some bank.

(e) It was not the intention of the bank to hold the trustee personally liable, but to have a charge upon the trust fund and the interests of the signing creditors, as is also shown by the notes, originals and renewals, all of which were endorsed by the trust company without recourse.

(f) A bankruptcy court has the broadest equitable powers, even broader than the ordi-

nary court of chancery. To contend that the trust company could have no lien because it borrowed the moneys advanced, and to contend that the bank could have no lien because the trust company did not make itself personally liable, is neither equitable nor honest. Every one connected with the transaction knew that the money was being advanced under the belief and understanding that a lien was being created both upon the trust fund and upon the interests of the signing creditors for the amount of such advancement, and that otherwise it would not have been advanced.

(g) Whether or not a part of the moneys was actually advanced before the trust deed was actually executed by the bankrupt is immaterial. None of the moneys were advanced until after the instrument had been signed by all the creditors who did sign the same, and the whole transaction was ratified and approved at a meeting of the board of trustees and stockholders of the bankrupt on February 18th. Neither the bankrupt nor the signing creditors can contend that it was not advanced on the strength of the trust deed. No one contends to the contrary, and the correspondence mentioned above shows the fact. Other correspondence also shows that such was the original understanding. (See letters between Mr. Coman, Mr. Aaron and Mr. Stack, Exhibits 37, 38, 40, 41, 42, 43, 44, 34, 46, 47 and 48.)

Anyway, the bankrupt and the signing creditors have received the benefit of the money advanced at their instance and request, and upon the strength of their signing this instrument, cannot repudiate the same.

In this connection we beg to quote the language of Judge Dietrich:

> "From the record it is to be inferred that an emergency existed in the affairs of the debtor; that it had large assets but its credit was exhausted, and that it was doubtful whether it could meet its next payroll. The parties who are now objecting to the recognition of the trustee's claim were large creditors whose interests were likely to be prejudiced in case of receivership or bankruptcy proceedings. They were desirous that the debtor should continue to appear to be a solvent going concern, hence the plan outlined in the trust agreement. But the very object of this plan might be frustrated at any moment, and for that reason they were anxious to have the agreement go into effect as soon as possible. * * * * What consideration did it have for putting this sum into a tottering business enterprise, unless it believed that the trust agreement, by which alone it could have protection, was in effect? Surely there must have been a clear understanding upon the subject, or an experienced business man of large affairs, such as it seems Mr. Coman was, would not have done what, without such an understanding, would be utterly foolhardy. Mr. Aaron, acting as the attorney for some of the largest creditors, doubtless had such an understanding, and expected the trustee to act upon it, for in any other view his conduct would seem to be quite indefensible from the standing of either honor or good

morals. * * * * Doubtless the objecting creditors all knew that the trustee was acting upon the assumption that the trust agreement was in effect, and that the condition under consideration had been fully complied with. They must have known that it was making advances upon the strength of such assumption, and yet they kept silent. No one now suggests that the trustee would have advanced $100,000 or any considerable portion thereof without the belief upon its part that it was protected by the provisions of the trust agreement. The advances, while perhaps not fully beneficial, were highly beneficial to the estate. I am not inclined to acquiesce in the view that, knowing or having good reason to believe that the trustee was proceeding upon the assumption that the trust agreement was in effect and that it was advancing moneys in furtherance of the object of the agreement, primarily to protect the debtor, but ultimately for the benefit of the of the creditors, these petitioners, after remaining silent so long, can now, after the trustee has, to its injury and to their advantage, acted under the provisions of the agreement, be heard to say that it never went into effect. * * * * ''

BAD FAITH.

Pages 95 to 116 of appellants' brief are devoted to an argument that both the trustee and the bank acted in bad faith and therefore they are not entitled to recover this $100,000. Appellants indulge in many adjectives and some strong language, and this is quite natural, as the record shows beyond question that Judge Dietrich is right in his suggestion in the opinion that the present conduct of

these appellants does not accord with common honesty and fair dealing.

We have hereinbefore pointed out that neither in the formal writen objections to the petition of the trust company nor in the formal verified answer to the petition of the bank is there any charge of bad faith whatever.

If we correctly understand this argument, the charges of bad faith may be particularized as follows:

(a) The trustee did not take possession.

(b) $40,000 was loaned before Mr. Katz arrived.

(c) The bank paid itself a nine thousand-dollar over-draft out of the $100,000.

(d) The trust deed was not signed by the bankrupt until February 28th.

(e) The trustee did not conduct the business as provided in the trust deed.

(f) The business was operated at a loss.

This question of possession is quite fully discussed by Judge Dietrich as follows:

> "As to the question whether or not the trustee ever took actual possession of the property as directed by the trust agreement, I find upon examination of the record that just such possession was taken as was doubtless contemplated by the parties. In one aspect it is true the possession was colorable more than real, and my first impression was that the trustee had treated its obligations in this respect flip-

pantly, if not in bad faith, but when I come to analyze the record I find that it was clearly the intention of the parties signing the agreement that as little notoriety as possible be given to the transaction, and that therefore it was desired by all that the trust deed be withheld from the records until an emergency should arise making it necessary to record it, and that in so far as practicable the trustee should keep itself in the background. Any doubt which might otherwise exist is dispelled by the 'side agreement' or direction to the trustee, dated February 1, 1916, and introduced as Exhibit 39. Section 21 of the agreement itself provides that the agreement should not become effective until one Sigmund Katz, of Chicago, should be elected secretary and treasurer and a director of the debtor. But it should not be seriously suggested that anyone ever intended that Katz was to represent the interests of the debtor. He was undoubtedly there for the purpose of representing the creditors, and especially these objecting creditors, for it is provided that 'said Katz, or any other person that the majority in amount of the creditors of the lumber company (the debtor) who shall sign the within instrument, shall name, shall be elected and retained as such director and officer of such lumber company * * *, until the trust created by the within instrument shall be terminated.' It is very plain that the desire was that to the public at large the debtor should have the appearance of carrying on the business, and that, as stated in the 'side agreement,' as little publicity as possible should be given to the fact that its property had passed into the control of a trustee. Katz, being a member of the board of directors, and being the secretary and treasurer of the company, could guard against any precipitate action attempted by the debtor, until the trustee could be notified and could

> record the agreement and assert its exclusive right of control under the terms thereof. Katz was to be in the active management of the property, and while thus having his hand upon the throttle of the machinery of the debtor corporation he formally acknowledged himself to be the agent and representative of the trustee. It is futile now to say that the trustee violated its obligations to the creditors because it kept from the general public knowledge of its relations to the property, and of Katz's relation to it. It was undoubtedly doing precisely what the creditors wanted it to do in this respect." (Rec. pp. 85-86.)

Sigmund Katz was selected by H. J. Aaron, attorney and agent for Merrill, Cox & Company and Fort Dearborn National Bank. Katz was unknown to Mr. Gibbs or Mr. Coman or any of the other creditors. Aaron vouched for him as a man of lumber experience and ability and as the right man to come to Idaho to manage the business. Section 21 of the trust deed expressly provides that Sigmund Katz must be elected a director and secretary and treasurer of the bankrupt. Exhibit 39, dated February 1st, was signed by these large creditors and provides that the trust deed shall not be put of record and that as little notoriety be given to the same as possible. If the trust company had taken formal possession, ousted Gibbs and done business in its name, the matter would have become public and the object of these creditors nullified. So Aaron conceived the idea (and this trust deed was drawn by Aaron) that his friend, Katz, should be

the agent of the trust company and run the business, but that agency should be concealed from the public; he would be a director and sign papers as secretary and treasurer; he would be in absolute control without the knowledge by the public of the trust deed, but the purpose thereof would be carried out. It was arranged at the bank that no money could be drawn without the signature of Katz. (Rec. p. 229.) Katz came to Spokane with a letter of introduction from the vice-president of the Fort Dearborn National Bank to Mr. Coman and with instructions to see Mr. Coman and get his orders from him. He did this, then went to Gibbs, Idaho, and continuously thereafter ran the business until Merrill, Cox & Co. and the Chicago bank filed a petition in bankruptcy. In March the attorney for the trust company thought there should be something in writing in relation to this matter, and Mr. Katz got from the president of the bankrupt a letter acknowledging the fact that Katz was the agent of the trust company. (Rec. p. 225-9, 170-1.) When the stockholders' meeting of the bankrupt was held ratifying the trust deed, the fact of Katz being the agent of the trust company was also discussed with Katz. (Rec. p. 258, 167.) On February 19th Katz wrote a letter to the trust company, saying:

> "In reply to your request for our daily bank report, will say that we are preparing to send out such reports to every bank interested. The first reports will go forward in a few days." (Exhibit 13, Rec. 159.)

On March 31st a letter to the trust company signed by Gibbs and Katz, giving a list of the assets of the company, begins with these words:

> "I hereby wish to give you a list of the assets which we turned over to you on February 1st as trustee for our company." (Exhibit 20, Rec. 171.)

Katz sent a daily statement to the trust company. (Rec. 172.)

Whether this is or is not possession, it is unnecessary to discuss. It is the possession desired by the large creditors who signed the trust deed and the letter of instructions. The trustee did exactly what the large creditors wanted it to do, and they are clearly estopped from denying liability on account thereof.

This point was sustained by the court in In re Creech Bros. Lumber Co., 240 Fed. 8.

In this connection it is interesting to note who is making this particular objection. The following signing creditors are not, as they are not appellants:

Creditors	*Amount of Claim*
Fort Dearborn National Bank	$107,000.00
J. K. Stack	110,000.00
Idaho Timber Company	60,000.00
First National Bank of Lincoln	12,500.00
Shoshone Lumber Company	5,000.00
Exchange National Bank	6,000.00
S. H. Hess	30,000.00

Mrs. Tolerton	20.465.56
Total	$350,965.56

(Rec. pp. 57-8.)

The appellants are:

	Amount of Claim
Merrill, Cox & Company	$221,250.00
I. F. Searle	55,000.00
Mrs. C. D. Gibbs	12,725.00
Total	$288,975.00

So it is apparent, of course. that this is really the appeal of Merrill, Cox & Company and that Mrs. Gibbs and Mr. Searle are simply passengers. That is demonstrated by the brief itself.

H. J. Aaron, the attorney for Merrill, Cox & Company, drew the trust deed, selected Katz, instructed Coman what to do, and everything that has been done is either in accordance with his instructions first given or with his knowledge, approval and consent.

We find italicized on pages 111 and 112, appellants' brief, the statement that before Mr. Katz had arrived in Spokane, $40,000 of the money had been advanced and that on February 16th, 1916, $20,000 additional were loaned to the Stack-Gibbs Company and that the deed was not executed by the bankrupt until February 28th, and that counsel could demonstrate that these facts would

at least reduce the claim of the appellees to $40,000, and would do so except that it would make the brief too long.

That quick action was necessary was understood by all the parties, hence these telegrams of Mr. Aaron in the early part of February. "Creditors were pressing for payment of claims, labor was unpaid, loggers were demanding settlement for their accounts, and it seemed as though there was danger of the company being forced into the hands of a receiver. In fact, there were rumors that application for a receiver might be made." (Rec. p. 221.)

On February 9th, Mr. Coman, after receiving a telegram from Mr. Aaron that the trust deed had been signed by Mrs. Tolerton, wrote Mr. Aaron that advances would be made "in anticipation of the arrival of the contracts." (Rec. p. 223.) Aaron answered this letter and did not object to that statement. (Rec. p. 224.) Mr. Gibbs, the president of the bankrupt, concurred therein. (Rec. pp. 223-224.) Mr. Coman testified (Rec. p. 228):

> "As soon as the Mechanics Loan & Trust Company received a telegram from Mr. Aaron, they commenced advancing money. I refer to the telegram saying that the document was completed, the trust agreement. Nor did we stop because of the ambiguity here set forth in the letter. I had no doubt about the creditors and everybody agreeing to it because that was in accordance with our understanding."

When Katz arrived, $20,000 more was advanced. What was done with the $60,000 is set forth in a letter to the bank dated February 22, 1916 (Exhibit 10, Rec. pp. 149-151.) Mr. Katz sent this letter to the trust company, Merrill, Cox & Company, Fort Dearborn National Bank and Exchange National Bank. (Rec. p. 150.) The letter states that they have received $60,000 and that out of the business they have taken in $8,500. The letter states how the $68,500 was expended. The items of payroll, log contracts and freight on logs alone amount to over $40,000.

While at the trial the appellants and their associates as objectors sought to compel us to prove how this $100,000 was spent, and we did so prove, and also proved that it was all spent legitimately and in accordance with the letter and spirit of the trust deed, they do not now contend that the said $100,000 was not used for the purposes mentioned in the trust deed and in accordance with the letter and spirit thereof, except that they now, for the first time, contend that $9,000 thereof was used to pay an *overdraft* of the Exchange National Bank, which contention is false, as will be later demonstrated.

Whatever was done in respect to these advancements was known to the bankrupt and ratified by it at the stockholders' meeting and directors' meeting of February 18th authorizing the execution of the trust deed. It was known to the agent sent here

by these signing creditors,—and especially by Merrill, Cox & Company,—Mr. Sigmund Katz, who arrived in Spokane on the 15th or 16th of February. It was known to H. J. Aaron, the attorney for Merrill, Cox & Company and the Fort Dearborn National Bank, and acting for all of the signing creditors. At least it is apparent they relied upon Mr. Aaron to close up the transaction and look after their interests. The advancement was beneficial to the estate and to these signing creditors. An emergency existed, and Mr. Coman and the trust company acted in the best of faith in the matter. As said by Judge Dietrich in relation to another question:

> "Mr. Aaron, acting as attorney for some of the largest creditors, doubtless had such an understanding and expected the trustee to act upon it, *for in any other view, his conduct would seem to be quite indefensible from the standpoint of honor and good morals.*"

The conduct of Merrill, Cox & Company and their two passengers, Searle and Mrs. Gibbs, is indefensible from the standpoint of either honor or good morals.

Judge Dietrich further said:

> "No one now suggests that the trustee would have advanced $100,000 or any considerable portion thereof without the belief upon its part that it was protected by the provisions of the trust agreement. The advance, while perhaps not fully beneficial, were highly beneficial to the estate. I am not inclined to acquiesce in the view that, knowing or having

> good reason to believe that the trustee was proceeding upon the assumption that the trust agreement was in effect and that it was advancing moneys in furtherance of the agreement primarily to protect the debtor but ultimately for the benefit of the creditors, these petitioners, after remaining silent so long, can now, after the trustee has to its injury and to their advantage acted under the provisions of the agreement, be heard to says that it never went into effect."

Appellants do not undertake to bolster up their present inequitable position by any authorities, nor could they, for none exist.

The reason for the delay of the bankrupt in signing the trust deed until February 28th, the same having been ratified and approved at a meeting of the stockholders and directors on February 18th, does not appear in the printed record, because the matter is wholly immaterial. It does appear, however, in the record, that when Mr. Coman came back to Spokane his local attorney pointed out an ambiguity in paragraph 20 of the trust deed, and that there was some correspondence with the creditors to clear up same, and that was done without any misunderstanding in relation thereto. (Rec. p. 174-5.)

We now reach the point made by appellants that the Exchange National Bank held a nine thousand-dollar overdraft against the bankrupt and the same was paid out of this $100,000. While immaterial, it is not true. Judge Dietrich says in his decision (Rec. p 82):

> "It is clear beyond the need of discussion, I think, that in fact there was due to the Exchange National Bank of Spokane only $6,000."

The Exchange National Bank signed this trust deed as a creditor for $6,000.

This matter is not alleged directly or inferentially in the answer to the bank's petition nor in the objections to the trust company's petition. This point was not conteded for upon the hearing. During the trial the objectors seemed to think they had made a discovery on account of certain notes, one for $10,000 and one for $15,000, which were made in December, 1915, and which were cancelled by the bank the latter part of January, 1916, and before Mr. Coman went to Minneapolis. They stirred up some dust in relation to these notes and contended during the trial before the Referee that these notes were paid out of this $100,000. In the process of introducing evidence in relation to these notes some evidence was introduced on the subject of overdrafts, but the point was not made upon the hearing or elsewhere that there was in fact an overdraft in the bank on February 1st, and that it was paid out of the moneys in question. The books of the bank in respect to the bankrupt's account for January and February were in court and Mr. Adams cross-examined Mr. Coman in relation thereto, and while other dates were used by Mr. Adams in cross-examination as to said account, he did not ask Mr. Coman as to February 1, 1916. Neither did we,

because the question of overdraft on that date, whether it existed or did not exist, was not mooted or suggested either by answer, objections or suggestion or argument during the hearing. However, there is evidence in the record showing beyond the possibility of a doubt that there was no overdraft on that date, and no such overdraft was paid out of such moneys, and the two notes in question were not paid out of said moneys either in whole or in part.

The objectors put in evidence an exhibit to show the indebtedness of the bankrupt on February 1, 1916. (Rec. pp. 291-296.) There were two banks by the name of the Exchange National Bank, one in Spokane and the other in Coeur d'Alene. In this exhibit Mr. Katz has an item for overdrafts and has an overdraft against the Exchange National Bank of Coeur d'Alene (Rec. 294) (which, by the way, did not exist, in fact, as was found by Judge Dietrich—Rec. p. 82). As to the Exchange National Bank of Spokane, the only item of indebtedness to that bank is under the head of notes, and the item is $21,000. (Rec. p. 292.)

On cross-examination Mr. Katz testified:

> "The next item, the Exchange National Bank, $21,000, that item is made up of the $6,000 they signed for on the trust deed and the $15,000 notes that Mr. Coman and I have both testified that were marked cancelled some time or another."

We will first note the evidence in relation to these notes and then take up the evidence in relation to the overdrafts. Mr. Coman presented the original books of the bank and testified with those before him as follows: On December 30, 1915, C. D. Gibbs, as maker, gave a note for $5,000, which was also signed or endorsed by Stack-Gibbs Lumber Company. A certificate of deposit for that amount was issued but retained by the bank because that note was to be secured by an acceptance on a lumber company in Denver. The security never came, and on January 25, 1916, before Mr. Coman started for Minneapolis, that certificate of deposit and that note were cancelled. The bankrupt never got any credit on any book of the bank for said $5,000 and neither the bankrupt nor Gibbs ever used the same. (Rec. pp. 236-7.)

As to the ten thousand-dollar note on December 30, 1915, such a note signed by C. D. Gibbs and signed or endorsed by Stack-Gibbs Lumber Company was made out. The amount of that note was credited in the Stack-Gibbs Lumber Company account No. 2, which was a balance account.

Mr. Coman testified:

> "No checks or drafts could be drawn on that account except countersigned by me. That was for a special purpose. They never used the money. They had no right to use it, and it was never drawn from the bank." (Rec. p. 238.)

On January 25, 1916, that note was cancelled,

which was before Coman left for Minneapolis. (Rec. pp. 236, 239.) No money was used to pay either note.

On February 12th the bankrupt, per Cleland, wrote a letter to the bank enclosing a check for $153.33 as interest for forty days on these two notes, saying:

> "If this meets with your approval, kindly *cancel* the notes and return same to us."

That matter was attended to by the teller of the bank. (Rec. p. 255.) Mr. Coman told the creditors in Minneapolis about this transaction. (Rec. p. 231.) There is no controversy over the transaction being just as shown by the bank books. The bankrupt's books show that the notes were cancelled, the entry being under date of February 15th. (Rec. p. 215.) Katz admitted that no check was ever given to pay these notes or any part thereof except that check for interest. (Rec. p. 232.) The bank, of course, is bound by its statement in the trust deed that the indebtedness of the bankrupt to the bank on February 1st was $6,000, and that in truth was all it was.

Now as to the evidence in re overdrafts: At one stage of the proceedings Mr. Katz got enthusiastic on behalf of his Chicago friends and testified as quoted in appellants' brief. He was testifying *from the books of the bankrupt*, not made by him but by somebody else, and drawing certain inferences from those books. It is conceded that the

bankrupt's books might show a bank account overdrawn when in fact it was not overdrawn, because the checks had not been presented at the bank and a deposit was made before the checks were presented. "The books of the Exchange National Bank and the books of the Stack-Gibbs Lumber Company would never agree." (Rec. p. 229.) This was well illustrated by the state of the books on January 1, 1916, the bank books showing that the bankrupt had a balance of $202.25, while the bankrupt's books showed a balance of $28,195.77. (Rec. p. 230.) Katz conceded there was no overdraft on February 1, 1916. Some evidence on the subject of overdrafts was introduced because of the statement, "bank overdrafts, $12,000," in the letter issued February 22nd. (Rec. p. 151.) It appears from that letter that $60,000 of the $100,000 had been drawn and that $8,500 had been received from shipments of lumber, and that the $68,500 had been paid out, and the letter purports to state how the money was paid. One item was the item above quoted. The business of the bankrupt had been carried on continuously from February 1st to February 22nd and thereafter, and a bank that showed a credit balance on February 1st might show an overdraft on the 2nd or the 10th or the 20th, or any other day, and of course it was proper to use these trust moneys for any legitimate purpose of the business after February 1st. Mr. Katz, in attempting to figure out what was this twelve thousand-dollar item, testified (Rec. p. 154) that on

February 11th the Exchange National Bank of Coeur d'Alene, Idaho, had an overdraft of about $6,000; that on February 14th the Fort Dearborn National Bank had an overdraft of about $22,000, and then he undertakes to explain that the latter was not really an overdraft; that on February 15th the Exchange National Bank of Spokane had an overdraft of $8,000; on February 16th the Fort Dearborn National Bank showed an overdraft of $22,000, and the Exchange National Bank of Spokane, $10,000, and that $5,000 had been paid on the overdraft at the Coeur d'Alene bank. On the 17th the Fort Dearborn National Bank was overdrawn $10,000, and the Exchange National Bank of Spokane $13,000, and the Coeur d'Alene bank $1,000. On February 19th the Fort Dearborn National Bank, according to his books, showed an overdraft of $5,000, the Exchange National Bank of Spokane $5,000, and the Coeur d'Alene bank $1,000, and on the 21st the books showed the Fort Dearborn National Bank was overdrawn $5,000, and the Exchange Bank of Spokane $6,000. (Rec. p. 155.) And then he draws the conclusion that that letter which stated the twelve thousand-dollars overdraft item must have met the following payments on account of overdraft: Coeur d'Alene bank, $6,000; Spokane bank, $4,000; and the remainder was to the First National Bank of Lincoln, Nebraska. (Rec. p. 156.)

At a later time (Rec. pp. 180-181) Katz testified

he had gone over the figures again and discovered that the total disbursements in the letter of February 22nd should be $76,000 instead of $68,500, and at that time there were auditors here from Chicago (evidently sent out by the two large Chicago creditors).

Mr. Katz does not testify that on the 1st day of February, even according to the books of the Stack-Gibbs Lumber Company, in which there had been wrongully placed a charge against the Exchange National Bank for $15,000, subtracting that $15,000, there would be an overdraft of $9,000 on February 1st, but he testified (Rec. p. 209) that on the last day of January, according to the books of the bankrupt, the bank balance in the Exchange National Bank of Spokane was $10,074.11. Mr. Adams did not ask him as to the situation on February 1st, but at once jumped in the next question to February 14th, and it is on February 14th that he gets the overdraft of $9,000 according to the bankrupt's books, not on February 1st. (Rec. pp. 209-210.)

Finally the objectors themselves proved that there was no overdraft. Katz was their only witness. Through him they introduced (over our objection) a statement purporting to show assets and liabilities, and in that statement we find (Rec. pp. 302-303) that *on February* 1, 1916, *the deposit in the Exchange National Bank of Spokane was* $15,431.09, according to the books of the bankrupt.

This apparently included the false entry of $15,000. But there was a credit and not an overdraft, and the bank books would necessarily show a larger credit because there would be checks in transit. (Rec. p. 230.)

When Mr. Coman was in court with the books of the bank showing the entire account of the Stack-Gibbs Lumber Company, and Mr. Adams was cross-examining him, he could have introduced the evidence from those books that there was an overdraft according to the books of the bank if such had been the fact. He did not introduce any evidence as to that date, because such was not the fact, but he did call out the fact that during December, 1915, the bankrupt had an average balance of about $4,000, and on January 11, 1916, it was $8,000. (Rec. p. 246.) He again cross-examined Mr. Coman in relation to this matter (Rec. p. 257) and drew out of him the fact that there was an overdraft on December 15th and on December 21st. The overdraft on December 15th was large, but the next day there was a balance—"evidently a remittance in the mail to cover that."

We did not ask Mr. Coman as to the condition of the bank books on February 1st, because there was no intimation or suggestion that the question of overdraft on that day would have existed or did not exist and had aught to do with this case. It was not pleaded in the answer or the objections. It was not suggested upon the hearing. The whole

controversy at this time was over the suggestion made by counsel that there was something wrong in relation to these two notes, one for $5,000 and one for $10,000. That, they have now abandoned and are injecting another false issue into the record.

This charge is not against the trust company, but against the bank. In the answer to the bank's petition they admit that the bank advanced $100,-000 and that it was used by the bankrupt, and their sole defense as stated in the answer is that the bank was not a party to the trust agreement and cannot take advantage of its terms. There is no charge of bad faith or impropriety or anything of that kind.

It appears that there were some overdrafts in February in the First National Bank of Lincoln, the Fort Dearborn National Bank of Chicago and the Exchange National Bank of Coeur d'Alene, and that those overdrafts, by some process or other, were reduced. It is not contended that the payment of any of these overdrafts would be in violation of the terms of the trust, or bad faith. Why any special privileges or preferences toward the other banks? Two of the other banks, the Chicago bank and the Lincoln bank, are signing creditors to the trust agreement and are among the original objectors, but are not now appellants.

Furthermore, Mr. Coman testified that he told the creditors at Minneapolis about the situation as

far as his bank was concerned, and there is no charge whatever that he made any sort of misrepresentation. Not one of these signing creditors, either in person or by agent or representative, has given any testimony in this matter.

Before taking up the next specific charge of bad faith in the brief, we will call attention to a few of the many misstatements of fact contained therein in reference to the subject last discussed.

It is said therein on page 97 that the balance note was for a larger sum than the loan made to the bankrupt. This is not true and there is no such evidence. On the contrary, Mr. Coman testified (Rec. p. 246):

> "The rule of the eastern banks that I have been dealing with is that the balance should be 20% of the amount of the loan. We are just getting to the point that we are introducing these eastern customs into our banking practice in Spokane and we haven't got up to as high as that percentage. In 1915 there was no fixed rule. Sometimes we banked as high as 20%, sometimes as low as 5%."

The misstatements on that and subsequent pages in respect to the two notes referred to have been above pointed out.

The statement on page 98, brief, that a part of the $6,000 loan was secured by real estate is not in the record at the place named. We are aware of no such evidence.

As to the period of the interest item, we have commented upon it above.

The general statement that the bank was charging usurious interest has no foundation in fact, but if it did, that would not afford any defense herein or any excuse for the attempted repudiation of these appellants. Judge Dietrich said in relation thereto:

> "Even were it to be granted that the dealings between this bank and the debtor were usurious or otherwise illegitimate or immoral, it still remains true that $6,000 was the actual maximum indebtedness, and that is the only fact with which we are here concerned." (Rec. p. 82.)

The statement on page 100 that Mr. Coman was "principal owner" of the trust company is simply one of the hallucinations of counsel. There is no such evidence.

The comments on Mr. Coman's testimony on pages 100 and 101, brief, need no comment, as we have cited this court to the record showing his testimony.

Why they should say at the bottom of page 101 that Mr. Gibbs and Mr. Coman had with them a trust deed drawn by Mr. Post, we know not. Anyway, Mr. Post is not the author of the instrument that was signed. That was prepared by Mr. H. J. Aaron, a Chicago lawyer and attorney for Merrill, Cox & Company. (Rec. p. 216.)

The statement on page 102 that Mr. Gibbs represented at Minneapolis, with the consent and acquiescence of Mr. Coman, that the Stack-

Gibbs Lumber Company was in splendid financial condition and that its assets largely exceeded its liabilities, and that with leniency, etc., has no support in the evidence. Mr. Gibbs had with him a statement of the assets and liabilities prepared by him, but that statement is not in evidence. What Gibbs said is not in evidence. No one of these creditors has testified in this case. It is not contended by the evidence that Mr. Coman knew anything more about this company than the other creditors knew about it.

Immediately after the execution of the trust deed, an auditor was sent from Chicago to examine the books of the bankrupt. It is self-evident that Merrill, Cox & Company, note brokers, and the Fort Dearborn National Bank of Chicago would not loan the Stack-Gibbs Lumber Company $338,000 without having an audit of their books and some examination of their property. Such a transaction does not accord with ordinary business prudence. On the other hand, the Exchange National Bank of Spokane had a loan of only $6,000.

The statement on page 102 that it was asserted to the creditors that $50,000 would be sufficient money to save the corporation is incorrect. It will be noted that counsel do not say who "asserted." The testimony shows that they talked about $50,000 in Minneapolis and that Mr. Fletcher of Fort Dearborn Bank stated that he had had large experience in transactions of this kind

and he thought it better to make it $100,000. (Rec. pp. 278-279.) It may be, as stated on pages 102 and 103, brief, that it was the duty of Mr. Coman to tell the creditors at Minneapolis all the facts within his knowledge, but there is no evidence that he failed to do that. There is nothing in the pleading or proofs on that subject. If Mr. Coman had thought that the Stack-Gibbs Company was really bankrupt and that the plan of financing would be a failure, it is manifest that he would not have advanced $100,000. Judge Dietrich clearly points out the absurdity of any such contention. Mr. Coman's confidence is also demonstrated by the fact that he agreed upon a rate of interest at 6%, although the usual banking rate was 8%.

The statement on page 103 "that his (Coman's) silence in the face of the false representations of C. D. Gibbs as to the condition of the Stack-Gibbs Company amounted to fraud on the balance of the creditors," like many others, is quite inexcusable. It is not only not contended in the pleadings that either the trust company or the bank or Mr. Coman was guilty of any fraud, but while they allege in their objections that false and fraudulent representations were made by C. D. Gibbs, Stack-Gibbs Lumber Company and the Dryad Lumber Company, the same being Objection No. 11 (Rec. p. 20), none of these objectors has had the decency to give any testimony and there is no testimony on that subject. Furthermore, there is no testimony that Mr. Coman had any knowledge or suspicion that

anything that Mr. Gibbs said was otherwise than truthful. The fact is that every one connected with this transaction had confidence in Mr. C. D. Gibbs. The whole record shows that.

Subdivision 3 on pages 112 and 113, brief, is devoted to a tirade against the trust company, consisting of the general statement that the trust company did not carry on the business and closing with the expression that counsel hazard the suggestion that their statement that the position of the trust company and the bank is inconsistent with good morals, good business and the fiduciary relationship of the trust company will go unanswered. It was answered by Judge Dietrich in his decision. The facts are plain and indisputable. These creditors conceived the idea that the trust company should keep in the background; that the trust should be kept a secret; that the deed should not be put of record; that their own man, Mr. Katz, should come out from Chicago and run the business. He was selected by Aaron, the attorney for the appellant, Merrill, Cox & Company. Katz came, and the instructions of these appellants and the other creditors were faithfully obeyed.

Subdivision 4, pages 113 and 114, brief, says the trustee did not collect any of the debts owing the bankrupt. That statement is untrue and there is no such evidence. There has never been any contention that any debt owing the bankrupt was lost through any failure on the part of the trust com-

pany. According to Mr. Katz's exhibit (Rec. p. 302), the bills receivable on February 1st amounted to less than $6,000. There is no evidence of any neglect in relation thereto. However, if their man, Katz, was neglectful in some regard, we are at a loss to understand the mental operations of any person who would think that the people who selected him and presented him to the trust company could, because of that fact, if it existed, repudiated their own debts or obligations to the trust company.

The point that the business was operated at a loss was a star point of the objectors during their introduction of evidence before the Referee, all introduced over our objection as immaterial and not within the issues made by the answer and objections. The size of even the printed record on the subject demonstrates this, but now it has been shoved into the background and there are only ten lines on the subject in appellants' brief, page 114. Apparently the absurdity of the contention has penetrated the consciousness of Merrill, Cox, Aaron, Katz & Company. We feel that we should not wholly ignore the insinuation in appellants' brief.

Merrill, Cox & Company and their passengers, Mrs. C. D. Gibbs and Mr. Searle, do not contend that Mr. Katz was lacking in capacity or competence to handle the business, nor that he acted dishonestly or lacked industry or attention. As he

was selected by them and put in charge at their instance, such an excuse for their attempted repudiation would not receive much favor. Katz himself testified that he knew of nothing that could be even characterized as mistaken judgment except that there might be possible criticism as to the building of a little logging road that would cost ten or twelve thousand dollars, and as to that, he acted according to the best information he could obtain and according to that information he could not be charged with even a mistake of judgment. (Rec. p. 335.)

The whole testimony on the subject of loss of money was received over our objections (Rec. 297). Later our motion to strike same (Rec. p. 355) should have been granted.

The Referee conceded that Exhibit No. 4 (Rec. p. 301-6) prepared by Mr. Katz was without much, if any, weight, but he would not strike same. (Rec. p. 357-8.) Katz's contention was that, as shown by said Exhibit No. 4, the bankrupt estate had been decreased between February 1st and July 29th by the sum of $43,812, but that the Dryad Lumber Company had made a profit during said time of $18,489. Appellants assert in their brief that the two companies should be treated as one as far as this appeal is concerned. (Appellants' Brief, pp. 9-10.) The difference between the two items is $25,325. So if there was a loss in the management of the trust and this evidence is to be accepted on

that subject, the last named figures are the amount of loss. The evidence, however, does not show loss. It is apparent that this exhibit was prepared to assist the witness' Chicago friends. That is conclusively demonstrated by the exhibit itself. See the item headed "Reduction in Assets between February 1, 1916, and July 29, 1916." (Rec. pp. 304-5.) You will note (Rec. p. 305) that these assets which were used up between those dates are put in at "market price." This is followed by a heading entitled "Addition to Assets Between February 1, 1916, and July 29, 1916, which assets were still on hand July 29, 1916." In Record, page 305 the first lot of items, the prices are "those of appraisers," not Mr. Katz's valuations but the appraisers' in the bankruptcy proceeding, and of course placed very low. Then turn to page 306 under the same heading; you will note that the first three items of logs are not valued as "market price" or market value, but on some other basis. Following is an item of lumber. The lumber item gives the footage for February 1st and the footage for July 29th, and they subtract those two items and then figure the differences on the basis of "average cost price" and not on the basis of value. In other words, Mr. Aaron's friend, Mr. Katz, figures the "reduction in assets" on the basis of market value, but the item, "addition to assets," on the basis of *cost* instead of market value. Not only that, but they had three different kinds of lumber,—white pine of various grades, the most

valuable, and western pine of various grades, and mixed timber of various grades. The value of the lumber on hand February 1st depends upon (a) the quantities of each character of lumber and (b) the grades of each character of lumber, and the same is true as to the value of the lumber on hand July 29th.

Between February 1st and July 29th the mill was being run and lumber was being manufactured and sold. To subtract the quantity on hand February 1st from the quantity on hand July 29th and figure that quantity at average cost price, is an arbitrary proceeding admittedly wholly inaccurate for the purpose of determining the value of the increase in assets. The 4,612,000 feet on hand February 1st may have been mostly fir and tamarack, and the lumber on hand July 29th, 5,864,000 feet, may have been mostly white pine of first quality. There is no evidence on the subject. Katz said (Rec. p. 351): "I cannot give you the proportion of white pine," referring to the lumber on hand February 1st, and (same page), "I do not know the market price of lumber at that time," and (same page), "White pine was worth more than western pine; I would think it was five or six dollars more a thousand than western pine, and western pine about two dollars a thousand more than mixed," and (Rec. p. 352), "I did not figure on the value of the lumber as of February 1, 1916;" also, "We never went into details as to how much of the lum-

ber was white pine or how much was yellow pine or how much was mixed."

"Q. You just took a running jump at it?

A. That was just about what we did.

Q. But in order to get at the average cost price, you have got to get at the quantity of each kind of lumber, haven't you?

A. Well, in order to figure out exactly what the lumber did cost, you have got to point out all those details you have just mentioned." (Rec. pp. 352-3.)

He admits that if 4,000,000 of it is white pine and 1,000,000 feet yellow pine, the average cost price figure would be different than if 3,000,000 feet was white pine and 2,000,000 feet yellow pine. (Rec. p. 353.) In other words, he admits that his average cost figure is incorrect even on that basis. He says that he cannot tell the *value* of lumber on hand July 29th. (Rec. p. 353.) He says (Rec. pp. 354-5):

"Q. But if when you compare, if you were trying to get at in making up the schedule, Exhibit 4, the difference in the market value of the lumber at Gibbs, Idaho, as it was on February 1, 1916, and the value of the lumber as it stood at Gibbs, Idaho, on July 29, 1916, you would get up an entirely different set of figures than you did in Exhibit 4?

A. Yes, I certainly would go at it differently.

Q. And if you were undertaking to get the market value of the lumber as it stood on these two different dates, you would have to have the quantities of white pine and other classes of lumber as of each date, wouldn't you?

A. Yes, sir.

Q. If it was less, if the quantity of white pine was less on February 1st than it was on July 29th. then it would not be fair, would it, Mr. Katz, to subtract the two items and then determine the value on the difference; you couldn't do it that way, could you?

A. As a matter of mathematical calculation, not very well unless you simply assumed an average.

Q. No, not an average. I say if the percentage as to white pine was different on February 1st than it was on July 29th, you couldn't do it this way by subtraction?

A. No, sir."

We then made a motion to strike this Exhibit No. 4. (Rec. pp. 355-6.) The Referee denied the motion but stated that the exhibit was entitled to but little weight. (Rec. pp. 357-8.)

It is evident that the exhibit as explained by Mr. Katz's testimony is entitled to no weight at all. It is also evident that appellants concede that. Otherwise there would be come real discussion of

the subject instead of ten lines on page 114. The position of Merrill, Cox & Company is this:

> "As large creditors of the Stack-Gibbs Company, we thought it best for ourselves that that company should make an assignment to a trust company and that the trust company should advance $100,000 to run the business at 6% interest, such advancement, together with other expenses, to be a first charge against the property and against our interest by way of dividends. For our own protection we selected the man to run the business. The trust company accepted our man and he ran the business. Our man was not guilty of any peculation or dishonesty or bad judgment, but the thing did not turn out as well as we hoped for and he actually made a loss of about $20,000. The money was advanced by the trust company and used to meet payrolls and pay small creditors and do other things as contemplated by the trust deed. The trust deed provides that the trust company shall not be liable for any losses. Nevertheless, we contend that because there was a small loss under the management of our man, the trust company shall lose the $100.000 it advanced."

Further comment is unnecessary.

NINETY PER CENT

The last contention made by appellants is that they can repudiate the contract, accept the benefits of the advancements made by the trust company and prevent either that company or the bank from having any lien, although all the advancements were made according to the understanding and agreement of the parties, because they say that

when figured out mathematically the debts represented by the signing creditors did not equal 90%.

It will be noted that the order of the Referee will stand and is final and conclusive as to each and every one of the signing creditors representing more than one-half in amount of said claims, because none of them are appellants herein, the only appellants being Merrill, Cox & Company, Mrs. Gibbs and Searle.

It will also be noted that the claims of Searle and Mrs. Gibbs amount to only $67,000, while the claim of Merrill, Cox & Company amounts to $221,000, and that H. J. Aaron had charge of this business for the latter and really for all of the signing creditors. What was done was either per his instructions or with his knewledge and acquiescence, as will be pointed out below.

We contend that according to the letter and spirit of the trust deed, 90% did in fact sign. We also contend that it is not material and that these appellants cannot raise the point for the reasons fully discussed hereinafter.

Judge Dietrich covered this question quite fully (Rec. p. 78):

> "The most serious question is whether the trust agreement was signed by a sufficient number of creditors to give it validity. The referee did not find that as a matter of fact the signatures aggregated ninety per cent of the total indebtedness, nor do I think that if we regard the instrument alone, apart from

the practical construction placed thereon by the parties in interest, it would be possible to make such a finding. While we might very reasonably exclude certain of the items embraced in the $871,853.27, which the petitioners here contend is the correct footing, we cannot consistently exclude enough to give the required ratio between the entire remaining indebtedness and that represented by the signatory creditors. But I am satisfied that all the parties acted upon the assumption that with the signature of Mrs. Tolerton the condition was fully complied with, and that the practical construction placed upon a writing at the time of and subsequently to its execution by the parties in interest may, and ordinarily should, be adopted by the court. From the record it is to be inferred that an emergency existed in the affairs of the debtor; that it had large assets, but that its credit was exhausted, and that it was doubtful whether it could meet its next payrolls. The parties who are now objecting to the recognition of the trustee's claim were large creditors, whose interests were likely to be prejudiced in case of a receivership or bankruptcy proceedings. They were desirous that the debtor should continue to appear to be a solvent, going concern; hence the plan outlined in the trust agreement. But the very object of this plan might be frustrated at any moment, and for that reason they were anxious to have the agreement go into effect as soon as possible. They discussed the signatures that could probably be obtained, and made provision for taking up and satisfying intractable claims up to a certain amount. So far as appears, the trustees and its allied interests were not deeply concerned. The actual indebtedness held by the Exchange National Bank of Spokane was only $6,000.00, and was relatively unimportant. I am wholly

at a loss to understand how the trustee could have had any strong motive of self-interest such as would induce it to assume a large risk in advancing the $100,000.00 authorized by the agreement. What consideration did it have for putting this sum into a tottering business enterprise, unless it believed that the trust agreement, by which alone it could have protection, was in effect? Surely there must have been a clear understanding upon the subject, or an experienced business man of large affairs, such as it seems Mr. Coman was, would not have done what, without such an understanding, would be utterly foolhardy. Mr. Aaron, acting as the attorney for some of the largest creditors, doubtless had such an understanding, and expected the trustee to act upon it, for in any other view his conduct would seem to be quite indefensible from the standing of either honor or good morals. I have no doubt that he understood that the condition had been fully complied with, and assumed that the trustee would have the protection afforded by the trust agreement. Surely under the circumstances it was not contemplated that the trustee was at its peril to determine for itself whether the requisite ninety per cent had signed. For example, there appear to have been some controverted claims and other claims not disclosed by the records of the debtor. Was it to wait until the disputed claims were litigated or otherwise adjusted, or until the statute of limitations had fully run, in order that it might be sure that there was no undisclosed indebtedness, before it could safely proceed to execute the trust? When we come to examine the agreement we find that its spirit is out of accord with such a view. In paragraph nine it is expressly provided that in the conduct and management of the trust estate the trustee should be reimbursed out of

the estate for any claim which might be asserted against it, for damage done to third persons, even though such damage might have been caused by the negligence or misconduct of the trustee's officers, agents and employes. And in the fifteenth paragraph it is provided that if the trustee exercised reasonable care in the selection of its agents and employes it should not be held liable for any loss or damages from their negligence or default. Doubtless the objecting creditors all knew that the trustee was acting upon the assumption that the trust agreement was in effect, and that the condition under consideration had been fully complied with. They must have known that it was making advances upon the strength of such assumption, and yet they kept silent. No one now suggests that the trustee would have advanced $100,000.00, or any considerable portion thereof, without the belief upon its part that it was protected by the provisions of the trust agreement. The advances, while perhaps not fully beneficial, were highly beneficial to the estate. I am not inclined to acquiesce in the view that, knowing or having good reason to believe that the trustee was proceeding upon the assumption that the trust agreement was in effect and that it was advancing moneys in furtherance of the object of the agreement, primarily to protect the debtor, but ultimately for the benefit of the creditors, these petitioners, after remaining silent so long, can now, after the trustee has, to its injury and to their advantage, acted under the provisions of the agreement, be heard to say that it never went into effect.

When in the light of the surrounding circumstances and the conduct of the parties we consider the several items relied upon by the petitioners as constituting part of the indebt-

edness, we find little difficulty in eliminating most of them. It is clear beyond the need of discussion, I think, that in fact there was due to the Exchange National Bank of Spokane, only $6,000.00. Even were it to be granted that the dealings between this bank and the debtor were usurious or otherwise illegal or immoral, it still remains true that $6,000.00 was the maximum actual indebtedness, and that is the only fact with which we are here concerned.

There was in truth no overdraft at the Exchange National Bank of Coeur d'Alene. While in a sense the floating checks upon this bank aggregating $15,431.07 represented indebtedness, they were issued in the expectation that current deposits would be sufficient to take care of them as they were presented. Such a species of indebtedness would naturally fluctuate from day to day, if not from hour to hour, and it is not to be assumed that the parties contemplated that it would be taken into account.

The debtor was under contract to deliver to divers persons lumber and logs to the aggregate value of $79,852.62. From one point of view, of course, these obligations are the equivalent of an indebtedness in the strict sense of the word, but the trust agreement itself bears strong internal evidence that such obligations were not intended to be taken into consideration as a part of the 'indebtedness.' Express reference is made to the largest of such contracts, one covering lumber of the value of $32,948.40, with a provision for its specific performance by the delivery of the lumber called for. So far as appears, the debtor was having no trouble in meeting obligations of this character. It had sufficient assets, but its embarrassment was due to its inability to realize money thereon. Apparently it was able to

> meet its obligations under these contracts—which required no payments in money—and was ready to do so.
>
> There is also an item of $19,500.00 of indebtedness due to one Yeomans, who held lumber as security. Apparently the parties intended to treat secured claims as being in a distinct class. For example, there were also obligations secured by a trust deed, but no one is contending that they should be considered in computing the indebtedness covered by the trust agreement; and yet in a very real sense, of course, they constitute indebtedness.
>
> Most difficult perhaps of all are the numerous items, disputed and undisputed, amounting to approximately $40,000.00, which did not appear upon the debtor's books, but, as already suggested, it is hardly reasonable to suppose that anyone thought that the trustee must, at its peril, find out whether the debtor owed unrecorded debts. It is quite incredible that anyone could have been found willing to accept the trust upon such terms."

As stated above, we contend that the amounts represented by the signing creditors in fact constituted 90% of the indebtedness of the bankrupt, as understood by the parties and as shown by the trust deed itself, without the benefit of any extraneous evidence.

The amount represented by the signing creditors is $639,940.56. (Rec. pp. 57-8.) Defendants Exhibit No. 3 (Rec. p. 295) places the total indebtedness as per books February 1st at $636,519.35. Mr. Katz omitted therefrom the conceded indebtedness of three of the signing creditors, to-wit, Mr. Searle,

Mr. Hess and Mr. Stack, of $195,000, which added makes a grand total of $831,519.35.

Mr. Katz also states in Exhibit No. 3 that there were liabilities in existence on February 1st *which were not on the books* amounting to $40,333.92, and testified that some of these liabilities were disputed items and subject to litigation and there was no way of obtaining knowledge of them until the bills were presented. (Rec. pp. 317-320.) Clearly they are immaterial so far as the present controversy is concerned.

Manifestly it was not the intention of the parties that if creditors representing 90% of the indebtedness *as per books* should sign this trust deed and moneys should be advanced and expenses incurred by the trustee, and it should subsequently turn out that there was some indebtedness not shown upon the books, which, if taken into consideration, would reduce the percentage blow 90, then the trust company would lose its expenses and advancements. It is presumed that these business people were acting intelligently and honestly with one another. It certainly was not the intention of the parties that Mr. Coman must find at his peril all indebtedness not shown on the books, in addition to that for which the creditors signed. Surely he was to take the figures put upon his trust deed by these creditors at their face value and the figures as shown upon the books at their face value. The contract is not to be construed so as to make a snare out of it.

As said by the Supreme Court of the United States in 94 U. S., p. 46, elsewhere cited in this brief:

> "Every intendment is to be made against the construction of a contract under which it would operate as a snare."

Clearly, in making our figures, we must discard the item of $40,333.92 (doubtful items, some in litigation), *none of which are shown on the books of the company* and none of which could be discovered speedily or discovered by an accountant at all from the books and papers. The whole record shows that an emergency existed and Mr. Coman was to act quickly and bring about an advancement of the money, and such was the desire of all of the objectors. That desire is put in writing by the appellants, Merrill, Cox & Company, per their attorney, H. J. Aaron.

The other item, total of liabilities on books, as placed by Mr. Katz, $636,519.35, contains many errors which we will first consider. There are two patent errors: (a) He has put down Exchange National Bank of Spokane as a creditor for $21,000 instead of $6,000; and (b) he has put down the Exchange National Bank of Coeur d'Alene as having an overdraft of $15,431.09. He admits that in order to make the Exchange National Bank item $21,000, he adds to the $6,000 for which the bank signed the trust deed the two notes, one for $5,000 signed by C. D. Gibbs, and one for $10,000 signed

by C. D. Gibbs and the lumber company, concerning which considerable evidence was introduced and which has been commented upon above in this brief. The Stack-Gibbs Lumber Company never got the cash on these notes, never got any credit on the books of the bank on these notes, and these notes were cancelled without being paid by check or in any other manner on January 25, 1916. There is no controversy over that. Furthermore, when the bank signed the trust deed on February 1st for $6,000 and no more, it agreed with the other signing creditors that that was the total amount of its claim against the lumber company which should or could be taken into consideration in determining this 90%. It is clear, therefore, that that item of $15,000 should be subtracted from Mr. Katz's figures.

As to the alleged overdraft of $15,431.09 at the Exchange National Bank of Coeur d'Alene, it is beyond dispute that such item cannot be taken into consideration, and for many reasons: In the first place, there was no such overdraft. The bank books do not show any such overdraft, but show that there was no overdraft on that day or for several days before that or for several days after that. The cashier of the bank, Mr. Sowder, so testified. (Rec. p. 361.)

Paragraph 20 of the trust agreement says: "90% in amount of the *indebtedness* of the lumber company." How can it be said that on February

1st there was an indebtedness to the Coeur d'Alene bank on account of overdraft when there was no overdraft on the bank books? The mere sending out of checks to Jones, Brown & Robinson which are in the mail and which have never been presented to the bank cannot constitute an indebtedness to the bank. It appears that before these checks were presented to the bank, the lumber company had deposited moneys or papers, so that when the checks did arrive no overdrafts were created. Suppose that at the opening of business on February 1st the lumber company had on deposit with the bank the sum of $1,000, and suppose that at 10:00 A. M. it issued a check on that bank for $2,000 and mailed the same to the payee at Chicago, and suppose that at 10:05 A. M. the lumber company sent a messenger to the bank with $2,000 in currency and the same was there deposited at 10:30 A. M.; the lumber company's books at 10:00 A. M. might show a bank overdraft; at 10:30 A. M. they might show a credit of $1,000; but no matter what they showed, was there at any time between 10:00 A. M. and 10:30 A. M. an *indebtedness* on account of the lumber company at the bank? Manifestly not.

In order to get at the purpose and intent of Section 20, which provides for 90% signing, we must also read Section 10 of the trust agreement. This section provides for advancements to the extent of $100,000, said money to be used to meet the payroll "and to discharge the claims of the credi-

tors who do not execute this instrument, as the trustee may deem necessary or requisite to protect the trust estate." In other words, what the parties were trying to do was to tie up enough creditors so that $100,000 would be sufficient to meet the payroll and to pay the creditors who under the contracts with the lumber company were to be paid in *cash* and who might make trouble if they were not settled with. That was the purpose of it, and it is the purpose of the contract, its intent, that controls its language. It would have been silly to have invited the Coeur d'Alene bank to sign this trust agreement on the theory that on February 1st there was an overdraft to it, when in fact the bank books showed there was no overdraft and it was not a creditor. That bank could not be a signing creditor. It could not make any trouble. It did not have any overdraft. What the trust agreement contemplated was *net* indebtedness. Checks of the lumber company in transit which should be met by cash on hand, or checks coming to the lumber company, would of course not be taken into consideration in determining the indebtedness for the purposes of this trust agreement.

Subtracting these two items, then, from Mr. Katz's figures as to the indebtedness of the bank (including Hess, Searle and Stack), we have $801,-088.26, and the signing creditors, representing $639,940.56, 80% thereof.

But there are other matters to be taken into con-

sideration in determining this 90% question. The Central Warehouse Lumber Company's claim, according to Defendants' Exhibit No. 3 (Rec. p. 292), was $32,948.40, and that amount was not be be paid in money at all, but was to be paid in lumber (Rec. p. 44, par. 16 Trust Deed), and the same is true of the Loonau Lumber Company account of $4,239.98 (Rec. p. 320, 3), the Rogers Lumber Company account of $1,835.91 (Rec. p. 292, 320, 3), the Salzer Lumber Company account of $4,280.00, the Bardwell-Robinson Company account of $3,681.40, the Lampert Lumber Company account of $9,559.68, and the Empire Lumber Company account of $9,078.40. The Atlas Tie Company account of $14,228.85 was to be paid in logs. (Rec. p. 320, 3.) The Yeomans account of $19,500 was secured by lumber in the yard. (Rec. p. 320, 3.) These various items amount to $99,348.66. None of these items except the Yeomans account can be considered as creditors having "indebtedness," because their items were to be paid in lumber or logs and not in money.

In Vol. IV. of Words & Phrases, we find the following definitions:

> "An indebtedness is the owing of a sum of money on a contract or agreement. 3 Mich. 277."

Also,

> "Indebtedness is defined by Anderson in his Law Dictionary as the condition of owing money, also the amount owed. Indebtedness

> is the state of being in debt without regard to the ability or inability of the party to pay the same. 25 Pac. 508-9."

In Vol. II. of Words & Phrases, we find the following:

> "A debt is created when one person binds himself to pay money to another. 34 Iowa 208, 213."

Also,

> "A debt is an obligation to pay a certain sum of money due from a debtor to his creditor. 61 Md. 132, 136."

Manifestly none of these parties, including Yeomans, would make any trouble which would necessitate the use of any part of this $100,000. By "making trouble" we mean making a demand for the payment of *money*.

Furthermore, paragraph 16 of the trust deed provides that the trustee shall carry out the contract with the Central Warehouse Company, which is a contract whereby that company is to be paid in lumber, and said paragraph also provides that the trustee shall or may carry out other similar contracts.

So it was not contemplated by the parties that these people should be asked to sign the trust deed or that they should be taken into consideration in determining the 90%.

Either these claims amounting to $99,348.66, for the purpose of determining this 90% figure, should

be added to the $639,940.56, being the amount signed to the trust agreement, or they should be subtracted from the item of $801,088.26. Whichever way it is done, the result will be that more than 90% is signed to the trust deed. If we add this $99,348.66 to the $639,940.56, we have $739,-289.22. 90% of the item of $801,088.26 is $720,-979.44. So by that method of calculation there was more than 90% signed. If, however, we subtract the $99,348.66 from the total item of $801,-088.26, we have $701,939.60, and 90% of that is $631,565.64, and by that method of calculation more than 90% signed.

These figures explain why the creditors agreed with Mr. Coman at Minneapolis that when Mrs. Tolerton signed, more than 90% would have signed (*and Mr. Coman gave this testimony without objection*); and these figures also explain the correspondence between Mr. Coman and Mr. Stack and Mr. Aaron, the attorney for appellant, Merrill, Cox & Company, who drew this trust deed, and these figures show the attitude of all the parties as testified to by Mr. Coman.

On February 2nd Mr. Coman wrote from Minneapolis to Mr. Stack, stating that 90% of the indebtedness was represented at the meeting. (Exhibit No. 37, Rec. p. 218.) Mr. Coman testified (Rec. p. 220) that Mr. Gibbs presented to the creditors at Minneapolis a statement of his assets and liabilities, and that the creditors there figured it

out that when the trust agreement was signed by Mrs. Tolerton, the requisite 90% would have signed the trust agreement. *This went in without objection.* Neither Mr. Aaron nor any other person has testified to the contrary. That is why on February 7th Mr. Coman telegraphed Mr. Stack:

> "Please advise by prompt wire if you have received my letter of second with enclosures. Before trustee can act and make advances provided for under agreement, necessary that the signature of yourself and one other creditor be added. Some matters are pressing and prompt action necessary." (Exhibit No. 40, Rec. p. 221.)

On February 8th Mr. Stack replied that he had signed the papers and forwarded them to Mr. Aaron at Chicago. (Exhibit No. 41, Rec. p. 221.)

On February 5th Mr. Aaron telegraphed Mr. Coman:

> "Contract not yet returned by Stack. *Can you hurry him.*" (Exhibit No. 42, Rec. pp. 221-2.)

On February 7th Mr. Aaron telegraphed Mr. Coman:

> "Contracts received. Now awaiting Mrs. Tolerton's signature. Will wire when secured." (Exhibit No. 43, p. 222.)

On February 9th Mr. Aaron wired again:

> "Contract signed by Mrs. Tolerton yesterday. Mailing this morning." (Exhibit No. 44, Rec. p. 222.)

On the same day Mr. Aaron wrote a letter to Mr.

Coman giving him specific instructions about holding a meeting of stockholders and directors and appointing Mr. Katz, and when Mr. Katz would leave Chicago, but said nothing about the 90%, and manifestly because everybody understood that 90% had signed. (Exhibit No. 34, Rec. p. 225.)

After receiving Mr. Aaron's telegram of February 9th, Mr. Coman wrote Mr. Aaron:

> "I am in receipt of your telegram under date of the ninth advising that Mrs. Tolerton has signed the contracts. The trustee will go ahead and make the advances and take care of the payroll due, in anticipation of the arrival of the contracts." (Exhibit No. 46, Rec. p. 223.)

On February 15th Mr. Aaron wrote Mr. Coman acknowledging receipt of that letter, but said nothing about getting any other creditors to sign or having Mr. Coman check up the books, or anything of that kind, but did advise him that Mr. Katz left Sunday night. (Exhibit No. 47, Rec. p. 224.)

We submit, first, that within the spirit, purpose and intent of the trust agreement, 90% did in fact sign; and second, that whether 90% did or did not sign is immaterial so far as these appellants are concerned, because the undisputed evidence is that they all agreed with Mr. Coman that when Mrs. Tolerton had signed, 90% would have signed, and that the trust company and the bank having acted thereon and advanced the money, these appellants are now estopped, according to plain, equitable principles, from contending otherwise.

Of course the bankrupt is estopped because it knew all the facts in relation to the amount of its indebtedness and as to the claims of the signing creditors and who signed it, and the bankrupt, by unanimous vote of the stockholders and the board of trustees, ratified this trust agreement and executed the same and the money was accepted and used for its benefit.

The appellants and other signing creditors knew that the money was being used for their benefit, as the principal creditors of the bankrupt, in order to keep the business going and permit the bankrupt to carry on its business and keep out of bankruptcy, in expectation that all of the creditors would be paid in full. The appellants and other signing creditors knew that the trust company and the bank were relying upon the same statement that they relied upon, to-wit, the statement made in Minneapolis that the amounts signed for by the signing creditors were as much as 90% of the total indebtedness of the bankrupt, and knew that the money would be advanced in reliance upon that statement, and permitted the money to be advanced and accepted the benefits thereof. None of them are now objecting except three. This state of facts shows a clear case of equitable estoppel and waiver of the performance of the conditions precedent.

The elementary principle is succinctly stated in Williams v. Bank of the U. S., 2 Peters 96, at page 102, as follows:

> "If a party to a contract, who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispense with, or by an act of his own prevent, the performance, the opposite party is excused from proving a strict compliance with the conditions."

In Insurance Company v. Norton, 96 U. S. 234, the Supreme Court again stated the principle, or a similar principle, at page 240, as follows:

> "The written agreement of the parties, as embodied in the policy and in the endorsement thereon, as well as in the notes and the receipt given therefor, was undoubtedly to the express purport that a failure to pay the notes at maturity would incur a forfeiture of the policy. It also contained an express declaration that the agents of the company were not authorized to make, alter or abrogate contracts or waive forfeitures. And these terms, had the company so chosen, it could have insisted upon. *But a party always has the option to waive a condition or a stipulation made in his own favor.* The company was not bound to insist upon a forfeiture, though incurred, but might waive it. It was not bound to act upon the declaration that its agents had no power to make agreements or waive forfeitures; but might at any time, at its option, give them such power. The declaration was only tantamount to a notice to the assured, which the company could waive and disregard at pleasure. In either case, both with regard to the forfeiture and to the powers of this agent, a waiver of the stipulation or notice *would not be repugnant to the written agreement,* because it would only be the exercise of an option which the agreement left in it. And whether it did exercise such option or not, was a fact *provable by parole*

> *evidence* as well as by writing, for the obvious reason that it could be done without writing."

An interesting case is California Raisin Growers' Association v. Abbott, 117 Pac., p. 767 (Cal.), the court saying at page 770:

> "By their answers, appellants aver that the contracts were delivered to plaintiff in escrow and were not to become operative until eighty-five per cent. of the raisin-bearing acreage of the State was secured by contract; that such percentage was never brought within the control of plaintiff, and that, therefore, the contracts could not be enforced. A complete answer to this contention is that the growers did deliver their raisins under the contracts and accepted money from the plaintiff. Even if delivery of the contracts in escrow with the proviso alleged were tolerated (and it is not—Civil Code, 1056, 1626, 1627), the acceptance of the terms of the contracts by the producers of raisins waived the escrow agreement."

In this connection we again cite a recent decision of this court:

> *In re Creeh Bros. Lumber Co.*, 240 Fed. Rep. 8.

We respectfully submit the order should be affirmed.

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